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# Some Reasons Why the Code States Should Adopt the Uniform Sales Act

(CONCLUDED FROM SEPTEMBER ISSUE.)

## OBJECTIONS TO THE ADOPTION OF THE UNIFORM SALES ACT ANSWERED.

**O**BJECTIONS based on distrust of codification.—The average lawyer, trained under our common law system, is apt to be imbued with a sort of instinctive distrust of codification, which, when analyzed, is found to rest upon some conviction that codification makes the law too rigid and projects the ideas of the present over future generations.<sup>99</sup> But for the purposes of this article, the correctness of such views in regard to codification need be neither affirmed nor denied. Living under the Field Codes, which are a crude codification, we suffer already the evils of this nature which codification is calculated to bring about. But lawyers and judges in trial practice constantly lean on the Code as now existing, and show no disposition to abandon it as a practical guide in litigation. The ordinary citizen who is not a lawyer, far from being averse to the principle of codification, welcomes the project as a step in reducing the law to a certainty, expecting to be able to adjust his conduct more readily to conform to the law and thus to avoid litigation. Whether the objections to codification are right or wrong, therefore, our local situation is that we have it, that our people approve it, that the members of our legal profession practice under and rely upon it, and that the objections to it are felt most strongly, not by our own people or lawyers who have experienced its effects, but by those who have been trained apart from the codes, whose

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<sup>99</sup> For authorities on the effect of codification generally, see, especially, Savigny, Von Beruf Unserer Zeit für Gesetzgebung und Rechtswissenschaft (On the Vocation of our Age for Legislation and Jurisprudence) against codification, and Austin, Jurisprudence, Lecture 39, in its favor. Also see Carter, Law: Its Origin, Growth, and Function, Lectures 11, 12. While the average lawyer who distrusts codification ordinarily has not precisely formulated his objections, they are usually based upon some one or more of the considerations dealt with at length by these writers and briefly adverted to in the text. For a bibliography of the literature of codification, see Pound's Outlines of Lectures on Jurisprudence, Lecture 14.

actual experience with codified law is negligible, and whose views on the question are derived rather from academic reflection than from practical experience. In view of our actual local situation, therefore, the fact that the Uniform Sales Act is an act of partial codification should rather commend than condemn it in the eyes of our people, while the fact that it is a thorough, improved, and up-to-date codification of the subject should, as a practical matter, commend it both to supporters of the principle of codification and to its opponents. Those who support the principle of codification can welcome the Uniform Sales Act as a new improvement upon the Code, a piece of machinery for the administration of justice which in their opinion has accomplished much good in the past and which will accomplish much more in the future. Those who object to the principle of codification may welcome the Uniform Sales Act as an improvement upon a code which in their opinion has already made our law rigid and projected upon us the ideas of the past. Whether one is disposed to commend or to condemn the principle of codification, he may, where codification of a sort is already an accomplished fact, support the project as a systematic, thorough revision intended to bring the existing codification into accord with the law of the time.

*Objections to codification of this particular branch of the law.*—The objection is occasionally made that while codification of certain branches of the law may be desirable, yet in other branches codification would, as a practical matter, be futile and the results of attempted codification in such branches undesirable. For example, it will be admitted that it is practicable and perhaps desirable to codify the rules of law relating to property, because they change at best very slowly and great importance is attached to their stability. On the other hand, it will be suggested that any codification of the modern law of torts would be futile, as it is still so largely formative in its character. That there is sound sense in taking such a position may also, for present purposes, be granted readily.

The answer to the position, if it is relied upon to oppose the adoption of the Uniform Sales Act, is that the rules applicable to sales transactions are really rules of property. In sales transactions, as in other dealings with property, rather than to have great flexibility with its consequent uncertainty, it is important

to have such certainty that business can be carried on with reasonable security.<sup>100</sup>

*Can this codification really produce uniformity?*—Some have said that the Negotiable Instruments Law failed to produce uniformity.<sup>1</sup> Can anything better be expected of the Uniform Sales Act? While it may be granted that the Negotiable Instruments Law might in some respects be improved,<sup>2</sup> it is generally conceded that its effect has been salutary,<sup>3</sup> that in many points it has produced uniformity,<sup>4</sup> and that nowhere, among the states which have adopted it, is there any thought of its repeal. In North Dakota, for example, the Negotiable Instruments Law has been in force for some seventeen years, no repeal is contemplated, and its effect has admittedly been, not only to make the law of negotiable instruments more nearly uniform with that of other states, but also to make it more certain than it was before.<sup>5</sup> If such salutary effects could be produced by the Negotiable Instruments Law, which was rather hastily drawn, without much consultation or extended criticism,<sup>6</sup> much more may be expected of the Uniform Sales Act, which was drawn by an expert after mature deliberation, and several times revised in the light of the most searching and intelligent criticism the country affords.<sup>7</sup>

A further consideration to show that the Uniform Sales Act actually produces uniformity is found in the section of the Act

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<sup>100</sup> See previous article, pp. 412-14.

<sup>1</sup> See, for example, Joseph L. Lewinsohn, 3 California Law Review, 300, remarking that the Negotiable Instruments Law has been not only a flat failure but also a source of confusion.

<sup>2</sup> See the Ames-Brewster controversy, in Brannan's Negotiable Instruments Law.

<sup>3</sup> See, for example, "Domestic Commerce and Uniform State Laws," by S. R. Child, in "The Nation's Business," June, 1916.

<sup>4</sup> See, for example, the provisions of the Negotiable Instruments Law, §§ 85, 39, 124. Others with similar effect are mentioned in Brannan's Negotiable Instruments Law, (2nd. ed.), p. 164.

<sup>5</sup> Comparison of the present code sections on Negotiable Instruments with those they superseded will amply bear out this remark, there being but few cases as yet decided by our courts.

<sup>6</sup> See the Ames-Brewster controversy, in Brannan's Negotiable Instruments Law. A contrary view, that the Negotiable Instruments Law was not hastily drawn, is set forth at some length, however, by Mr. Amasa M. Eaton, in 2 Michigan Law Review, 8. Even on Mr. Eaton's own showing, however, the whole time elapsing between the beginning of the project and the adoption of the final draft by the Conference of Commissioners was only a year, while the deliberate consideration by the experts in drafting the Act occupied but a few months.

<sup>7</sup> See the previous article, p. 403. Also preface to Williston on Sales.

itself providing for its being so construed as to effectuate uniformity in the law of those states which enact it.<sup>8</sup> No corresponding provision is found in the Negotiable Instruments Law. This provision has already been acted upon by courts and is upheld even by the Supreme Court of the United States.<sup>9</sup>

Instead of making the law more certain, will this codification make the law more uncertain? It has already been shown that on many points the Uniform Sales Act will give us definite rules of law where in our present Code and decided cases we have no certainty at all. Despite such a showing it is sometimes contended that any attempt to codify the law will have precisely the opposite effect and will render the law more uncertain than ever.<sup>10</sup> The argument is, that though the rule may be phrased in definite language, its meaning in application only the courts can determine through the process of litigation, and that until a line of cases under the formal rule has been developed, no one can tell what the courts will do, there being no cases showing what the courts have already done under similar circumstances.

The answer to this argument as applied to the Uniform Sales Act is three-fold. First, our present law is now so uncertain in many respects, often with no announced law on the particular subject at all, either in the present Code or in the decisions of the courts,<sup>11</sup> that, even granting the merit of the objection, we will gain rather than lose by adopting a statute which does furnish definite rules of law for many important questions. Second, the Act was carefully drawn as a codification of already existing case law. It does not introduce novel or peculiar doctrines in regard to which there would be no way of forecasting the position of a court. There is nothing new or startling in the Uniform Sales Act, for its contents are based throughout on the results which have been worked out through the courts in the process of actual litigation and on the pre-existing and generally prevailing principles of the common law. The problem of forecasting from the past what a court should do in the future will not be markedly different when new situations arise under

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<sup>8</sup> Uniform Sales Act, § 74.

<sup>9</sup> See note 13 below, for cases decided under section 74 of the Uniform Sales Act.

<sup>10</sup> Such is, for example, the argument in Carter, *Law: Its Origin, Growth, and Function*.

<sup>11</sup> For confirmation of this statement reference may be made to the numerous situations dealt with in the preceding pages.

the Uniform Sales Act from what it would be under the ordinary case law situation. Third, the Act has now been in force for a number of years in several states. Litigation on the questions dealt with has shown that the courts, in deciding cases under the Act, have found no difficulty in applying it to actual litigation and have experienced no difficulty in seeing what it means.<sup>12</sup>

As to this objection that the Uniform Sales Act would actually increase uncertainty, therefore, it may be answered in brief that our present law could hardly be made more uncertain than it already is, that there is no reason for anticipating an increase in uncertainty, since this Act is based throughout on decided cases, and that, in practice under the Uniform Sales Act no such result has actually occurred.<sup>13</sup>

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<sup>12</sup> It should be remembered that the Committee on Uniformity of Judicial Decisions is constantly gathering and briefly digesting the decisions from the various courts rendered under the Uniform Acts, and holding itself ready, so far as possible, to extend this information to the courts of last resort and to the profession generally. Inquiries in that regard may be addressed to Mr. Henry Stockbridge, Chairman of the Committee on Uniformity of Judicial Decisions, 75 Gunther Bldg., Baltimore, Md.

<sup>13</sup> Of the considerable number of cases already decided under the Uniform Sales Act in states where it has been adopted, most of the cases involve no question of doubt as to the meaning of the statute, but are cases applying the law to the facts. Some citations to the actual cases under the Act, largely supplied through the courtesy of Mr. Stockbridge and Professor Williston, are here reproduced. In a few instances the cases cited herewith were decided under the corresponding sections of either the Warehouse Receipts Act, the Bills of Lading Act, or the English Sale of Goods Act.

#### CASES DECIDED UNDER THE UNIFORM SALES ACT.

*Section 1.* Merrill v. Hodson (1914), 88 Conn. 314, 91 Atl. 533; McGaw v. Hanway (1913), 120 Md. 197, 87 Atl. 666; Dinsmore v. Maag-Wahmann Co. (1914), 122 Md. 177, 89 Atl. 399; Hall v. French Am. Wine Co. (1912), 149 App. Div. 609, 134 N. Y. Supp. 158; G. B. Shearer Co. v. Kakoulis (1913), 144 N. Y. Supp. 1077; In re Grand Union Co. (1914), 219 Fed. 353; Peuser v. Marsh (1916), 218 N. Y. 505, 113 N. E. 494.

*Section 2.* Reynolds v. Garber-Buick Co. (1914), 183 Mich. 157, 149 N. W. 985.

*Section 4.* Harlow v. Parsons Lumber & Hardw. Co. (1909), 81 Conn. 572, 71 Atl. 734; Wetopsky v. New Haven Gas Light Co. (1914), 88 Conn. 1, 90 Atl. 30; Barrett Mfg. Co. v. Ambrosio (Conn. 1916), 96 Atl. 930; DeNunzio v. DeNunzio (Conn. 1916), 97 Atl. 323; Brager v. Levy (1914), 122 Md. 554, 90 Atl. 102; Willard v. Higdon (1914), 123 Md. 451, 91 Atl. 577; Armstrong v. Orler (1915), 220 Mass. 112, 107 N. E. 392; Brown v. Fredk. J. Quinby Co. (1910), 204 Mass. 206, 90 N. E. 586; Peck v. Abbott & Fernald Co. (1916), 223 Mass. 404, 111 N. E. 890; Meyer v. Shapton (1914), 178 Mich. 417, 144 N. W. 887; Eigen v. Rosolin (1914), 85 N. J. Law 515, 89 Atl. 923; McAusland v. Reiser (1914), 90 Atl. 261; Harrison v. Scott (1911), 203 N. Y. 369, 96 N. E. 755; Morse v. Canaswacte Knitting Co. (1912), 154 App. Div. 351, 139 N. Y. Supp. 634; Davis v. Blanchard (1912), 138 N. Y. Supp. 202; Goldowitz v. Hy Kupfer & Co. (1913), 80 Misc. 487, 141 N. Y. Supp. 531; Hager v. Henneberger (1913), 83 Misc. 417, 145

The most serious objection to be raised against the adoption of the Uniform Sales Act is that it would work changes in our law as already announced. Lawyers, especially, will be prone to hesitate at the adoption of an Act with which they are not entirely

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N. Y. Supp. 152; Poel v. Brunswick-Balke-Collender Co. (1913), 159 App. Div. 365, 144 N. Y. Supp. 725; Langstroth v. Turner Cypress Lumber Co. (1914), 162 App. Div. 818, 148 N. Y. Supp. 224; Richardson Press v. Vandergrift (1914), 165 App. Div. 180, 150 N. Y. Supp. 238; Skinner v. Watson (1913), 159 App. Div. 359, 144 N. Y. Supp. 283; Spiegel v. Lowenstein (1914), 162 App. Div. 443, 147 N. Y. Supp. 655; Bauman v. Mendle-Lunep Co. (1915), 153 N. Y. Supp. 896; Schneider v. Lezinsky (1917), 162 N. Y. Supp. 769; Davis Laundry & Cleaning Co. v. Whittemore (1915), 92 Ohio St. 44, 110 N. E. 518; Namquit Worsted Co. v. Shitman (1915), 221 Fed. 49; Webster-Tapper Co. v. Eastern Hay Co. (1916), 98 Atl. 50; Friedman v. Plous (1914), 158 Wis. 435, 149 N. W. 218; Stack v. Roth Bros. Co. (1916), 162 Wis. 281, 156 N. W. 148; Prested Miners Co. v. Garner (1910), 2 K. B. 776.

*Section 5.* Dudley A. Tyng & Co. v. Converse (1914), 180 Mich. 195 146 N. W. 629.

*Section 5 (1).* Leonard v. Pennypacker (1913), 85 N. J. Law 333, 89 Atl. 26.

*Section 6.* Gourd v. Healey (1912), 206 N. Y. 423, 99 N. E. 1099.

*Section 8.* Automatic Time Table Ad. Co. v. Automatic Time Table Co. (1911), 208 Mass. 252, 94 N. E. 462; Carroll v. Haskins (1912), 212 Mass. 593, 99 N. E. 477.

*Section 9.* Boyd v. Second-Hand Supply Co. (1912), 14 Ariz. 36, 123 Pac. 619; Cobb, Bates & Yerxa Co. v. Hills (1911), 208 Mass. 270, 94 N. E. 265; Siegel v. Union Ass'n Society (1915), 90 Misc. 550, 153 N. Y. Supp. 662.

*Section 11.* Brought v. Redewill Music Co. (1915), 17 Ariz. 393, 153 Pac. 285; National Contracting Co. v. Vulcanite Portland Cement Co. (1906), 192 Mass. 247, 78 N. E. 414; Fechteler v. Whittemore (1910), 205 Mass. 6, 91 N. E. 155; Potter Printing Press Co. v. Newark Daily Advertising Co. (1912), 82 N. J. Law 671, 83 Atl. 969; Murphy v. Moon Motor Car Co. (1911), 147 App. Div. 91, 131 N. Y. Supp. 873; Sanford v. Brown Bros. Co. (1913), 208 N. Y. 90, 101 N. E. 797; Blair-Baker Horse Co. v. Hennessey (1914), 36 R. I. 132, 89 Atl. 299; Langer v. Finch (1915), 160 Wis. 668, 152 N. W. 416.

*Section 12.* Andrews v. Peck (1910), 83 Conn. 666, 78 Atl. 445; Am. Soda Fountain Co. v. Spring Water Carb. Co. (1911), 207 Mass. 488, 93 N. E. 801; Gascoigne v. Cary Brick Co. (1914), 217 Mass. 304, 104 N. E. 734; Norwood Paper Co. v. Columbia Paper Bag Co. Md. (1911), 185 Fed. 454; White Automobile Co. v. Dorsey (1913), 119 Md. 251, 86 Atl. 617; Greer v. Whalen (1915), 125 Md. 273, 93 Atl. 521; Rittenhouse-Winterson Auto Co. v. Kissner (Md. 1916), 98 Atl. 361; Putman-Hooker Co. v. Hewins (1910), 204 Mass. 426, 90 N. E. 983; Waterman-Waterbury Co. v. School Dist. No. 2 (1914), 182 Mich. 498, 148 N. W. 673; Washburn-Crosby Co. v. Kindervatter (1911), 147 App. Div. 114, 131 N. Y. Supp. 871; H. Koehler & Co. v. York Mfg. Co. (1912), 193 Fed. 981; Nelson Co. v. Silver (1913), 160 App. Div. 445, 145 N. Y. Supp. 124; Coleman v. Simpson (1914), 162 App. Div. 335, 147 N. Y. Supp. 865; Wasserstrom v. Cohen, Frank & Co. (1914), 165 App. Div. 171, 150 N. Y. Supp. 638; Wandell & Evans Co. v. Kennebott Co. (1914), 218 Fed. 622; Debany v. Rosenthal (1915), 90 Misc. 335, 152 N. Y. Supp. 1043; Marmet Coal Co. v. People's Coal Co. (1915), 226 Fed. 646; Hamilton, Iron & Steel Co. v. Groveland Mining Co. (1916), 233 Fed. 388; Kirkpatrick v. Kepler (1917), 164 Wis. 558, 160 N. W. 1047.

*Section 13.* Carbolineum Wood Preserving Co. v. Carter (1913), 50 N. Y. L. J. 361, commented on in 27 Harvard Law Review, 287; Tompkins

familiar, preferring to put up with the evils they have rather than jump to others they know not. That such an attitude is sound may be granted, without agreeing that absolute stand-patism is preferable. To be skeptical is a very different thing

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Kiel Marble Co. v. Bockman (1915), 154 N. Y. Supp. 196, 90 Misc. 700; Dreisbach v. Eckelkamp (1912), 82 N. J. Law 726, 83 Atl. 175; Hartley v. Rotman (1909), 200 Mass. 372, 86 N. E. 903; Kirkpatrick v. Keppler (1917), 164 Wis. 558, 160 N. W. 1047.

*Section 14.* Hanson & Parker v. Wittenberg (1910), 205 Mass. 319, 91 N. E. 383; Proctor v. Atlantic Fish Co. (1911), 208 Mass. 351, 94 N. E. 281; Borden v. Fine (1912), 212 Mass. 425, 98 N. E. 1073; Interstate Grover Co. v. Geo. Wm. Bentley Co. (1913), 214 Mass. 227, 101 N. E. 147; Cheboygan Paper Co. v. Eichberg (1915), 184 Mich. 30, 150 N. W. 312; Lissberger v. Kellogg (1909), 78 N. J. Law 85, 73 Atl. 67; Ross v. Northrup, King & Co. (1914), 156 Wis. 327, 144 N. W. 1124; Kelsey v. J. W. Ringrose Net Co. (1913), 152 Wis. 499, 140 N. W. 66.

*Section 15.* Brought v. Redewill Music Co. (1915), 17 Ariz. 393, 153 Pac. 285; Excelsior Coal Co. v. Gildersleeve (1908), 160 Fed. 47; Wels hausen v. Chas. Parker Co. (1910), 83 Conn. 231, 76 Atl. 271; Merrill v. Hodson (1914), 88 Conn. 314, 91 Atl. 533; Commercial Realty & Const. Co. v. Dorsey (1910), 114 Md. 172, 78 Atl. 1099; Proctor v. Atlantic Fish Co. (1911), 208 Mass. 351, 94 N. E. 281; Roberts v. Anheuser-Busch Brew. Co. (1912), 211 Mass. 499, 98 N. E. 95; Interstate Grover Co. v. Geo. Wm. Bently (1913), 214 Mass. 227, 101 N. E. 147; Gearing v. Berkson (1916), 223 Mass. 257, 111 N. E. 785; Wolverine Spice Co. v. Fallas (1914), 182 Mich. 361, 148 N. W. 701; Baker v. Kamantowsky (1915), 188 Mich. 569, 155 N. W. 430; Pentland v. Jacobsen (1915), 189 Mich. 339, 155 N. W. 468; Machine Mfg. Co. v. Donovan (1914), 86 N. J. Law 327, 91 Atl. 310; Quemahoning Coal Co. v. Sanitary Earthenware Specialty Co. (1915), 88 N. J. Law 174, 95 Atl. 986; Leiter v. Innis, Speiden & Co. (1912), 138 N. Y. Supp. 536; In re Nathan (1912), 200 Fed. 379; Stroock Plush Co. v. Talcott (1912), 150 App. Div. 343, 134 N. Y. Supp. 1052; Coleman v. Simpson, Hendee Co. (1913), 158 App. Div. 461, 143 N. Y. Supp. 587; Marx v. Locomobile Co. (1913), 82 Misc. 468, 144 N. Y. Supp. 937; G. B. Shearer Co. v. Kakoulis (1913), 144 N. Y. Supp. 1077; Standard Milling Co. v. Depas (1913), 154 App. Div. 525, 139 N. Y. Supp. 611; Race v. Krum (1914), 163 App. Div. 924, 147 N. Y. Supp. 818; Bonwit Teller & Co. v. Kinlen (1914), 165 App. Div. 351, 150 N. Y. Supp. 966; Leahy v. Essex Co. (1914), 164 App. Div. 903, 148 N. Y. Supp. 1063; Wasserstrom v. Cohen, Frank & Co. (1914), 165 App. Div. 171, 150 N. Y. Supp. 638; Sure Seal Co. v. Loeber (1916), 171 App. Div. 225, 157 N. Y. Supp. 327; Thompson v. Miser (1910), 82 Ohio St. 289, 92 N. E. 420; Kansas City Bolt & Nut Co. v. Rodd (1915), 220 Fed. 750; Marmet Coal Co. v. People's Coal Co. (1915), 226 Fed. 646; Pentland v. Jacobsen (1915), 189 Mich. 339, 155 N. W. 468; Matteson v. Lagace (1914), 36 R. I. 223, 89 Atl. 713; Leonard Seed Co. v. Crary Canning Co. (1911), 147 Wis. 166, 132 N. W. 902; Berry v. Wad ham Oil Co. (1914), 156 Wis. 588, 146 N. W. 783; Neck v. Marquette Cement Mfg. Co. (1914), 158 Wis. 298, 148 N. W. 869; Ross v. Northrup, King & Co. (1914), 156 Wis. 327, 144 N. W. 1124; Ohio Electric Co. v. Wisconsin-Minnesota Lt. & Power Co. (1915), 161 Wis. 632, 155 N. W. 112; Nashua Iron & Steel Co. v. Brush (1898), 91 Fed. 213.

*Section 16.* West End Mfg. Co. v. Warren Co. (1908), 198 Mass. 320, 84 N. E. 488; Androvette v. Parks (1910), 207 Mass. 86, 92 N. E. 1006; Borden v. Fine (1912), 212 Mass. 425, 98 N. E. 1073; Interstate Grocer Co. v. Geo. Wm. Bently Co. (1913), 214 Mass. 227, 101 N. E. 147; Gascoigne v. Cary Brick Co. (1914), 217 Mass. 302, 104 N. E. 734; Stewart

from an uncompromising attitude which tolerates no change whatever. To the reasonable person it may be shown that the fear of making a few slight changes in the already existing rules of law should not stand in the way of adopting the Uniform Sales Act in the Code States and securing the benefits of uniformity

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v. M. N. Voll & Son (1911), 81 N. J. Law, 323, 79 Atl. 1041; American Lace Mfg. Co. v. Levy (1915), 92 Misc. 156, 155 N. Y. Supp. 232; Schwartz v. Kohn (1915), 155 N. Y. Supp. 547; Regina Co. v. Gately Furniture Co. (1916), 171 App. Div. 817, 157 N. Y. Supp. 746; *In re Nathan* (1912), 200 Fed. 379.

*Section 17.* Isaac v. MacDonald (1913), 214 Mass. 487, 102 N. E. 81; Rylance v. James Walker Co. (1916), 99 Atl. 597.

*Section 18.* Dinsmore v. Maag-Wahmann Co. (1914), 122 Md. 177, 89 Atl. 399; Praeger v. Implement Co. (1914), 122 Md. 303, 89 Atl. 501; Bondy v. Hardina (1913), 216 Mass. 44, 102 N. E. 935; Carroll v. Haskins (1912), 212 Mass. 593, 99 N. E. 477; Rylance v. James Walker Co. (Md. 1916), 99 Atl. 597; Tompkins Kiel Marble Co. v. Bockman (1915), 90 Misc. 700, 154 N. Y. Supp. 196; Wilson v. International Ry. Co. (1916), 160 N. Y. Supp. 367; J. B. Bradford Piano Co. v. Hacker (1916), 162 Wis. 335, 156 N. W. 140.

*Section 19.* Home Pattern Co. v. Mertz Co. (1914), 88 Conn. 22, 90 Atl. 33; Emery Thompson etc. Co. v. Graves (Conn. 1916), 98 Atl. 331 (Section not cited but involved); Graham v. United States (1911), 188 Fed. 651; Rice v. Dinsmore (1914), 124 Md. 276, 92 Atl. 847; Dinsmore v. Rice (1916), 128 Md. 209, 97 Atl. 537; Rylance v. James Walker Co. (Md. 1916), 99 Atl. 597; Barrie v. Quimby (1910), 206 Mass. 259, 92 N. E. 451; Twitchell-Champlin Co. v. Radovsky (1910), 207 Mass. 72, 92 N. E. 1038; Automatic Time-Table Adv. Co. v. Automatic Time-Table Co. (1911), 208 Mass. 252, 94 N. E. 462; Bristol Mfg. Co. v. Arkwright Mills (1912), 213 Mass. 172, 100 N. E. 55; Wright v. Frank E. Andrews Co. (1912), 212 Mass. 186, 98 N. E. 798; Bondy v. Hardina (1913), 216 Mass. 44, 102 N. E. 935; Chandler Grain & Milling Co. v. Shea (1913), 213 Mass. 398, 100 N. E. 663; Isaacs v. MacDonald (1913), 214 Mass. 487, 102 N. E. 81; Powers v. Dodgson (Mich. 1916), 160 N. W. 432; Champlin v. Church (1908), 76 N. J. Law 553, 70 Atl. 138; Massman v. Steiger (1910), 79 N. J. Law 442, 75 Atl. 746; Ohl & Co. v. Barnet Leather Co. (1915) 87 N. J. Law 300, 93 Atl. 715; Engemann v. Delaware L. & W. R. R. (1916), 88 N. J. Law 45, 97 Atl. 152; Atlanta Building Supply Co. v. Vulcanite Port Cement Co. (1911), 203 N. Y. 133, 96 N. E. 370; White & Schweitzer (1911), 147 App. Div. 544, 132 N. Y. Supp. 644; Gass v. So. Pacific Co. (1912), 152 App. Div. 412, 137 N. Y. Supp. 261; Schanz v. Bramwell (1913), 143 N. Y. Supp. 1057; Westmoreland Coal Co. v. Syracuse Lighting Co. (1913), 159 App. Div. 323, 145 N. Y. Supp. 420; Fox v. Proctor (1914), 160 App. Div. 712, 145 N. Y. Supp. 709; Dube v. Liberty Clothing Co. (1915), 91 Misc. 64, 153 N. Y. Supp. 577; Sanitary Carpet Cleaner v. Reed Mfg. Co. (1913), 159 App. Div. 587, 145 N. Y. Supp. 218; Siegel v. Union Assurance Soc. (1915), 90 Misc. 550, 153 N. Y. Supp. 662; Conroy v. Barrett (1916), 95 Misc. 247, 158 N. Y. Supp. 549; Hauptman v. Miller (1916), 94 Misc. 266, 157 N. Y. Supp. 1104; State v. Bayer (1915), 93 Ohio St. 72, 112 N. E. 197; Spaulding v. Howard (Okla. 1915), 152 Pac. 106; McCollum v. Minn. St. P. & S. S. M. Ry. Co. (1913), 152 Wis. 435, 139 N. W. 1129; J. B. Bradford Piano Co. v. Hacker (1916), 162 Wis. 335, 156 N. W. 140.

*Section 20.* Praeger v. Emerson Brant Imp. Co. (1914), 122 Md. 303, 89 Atl. 501; Wilson v. International Ry. Co. (1916), 160 N. Y. Supp. 367; Lipschitz v. Napa Fruit Co. (1915), 223 Fed. 698; Rylance v. James Walker Co. (Md. 1916), 99 Atl. 597.

*Section 21.* Freeman v. Poole (1915), 37 R. I. 489, 93 Atl. 786.

and certainty which would follow. The demonstration that any such fear is unwarranted rests on several grounds, which will be here briefly dealt with in turn.

*Legislative changes in the existing law not anomalous but usual.*—That the fear of changing existing law as such is incon-

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*Section 22.* Rylance v. James Walker Co. (Md. 1916), 99 Atl. 597; Dinsmore v. Maag-Wahmann Co. (1914), 122 Md. 177, 89 Atl. 399; O'Neill-Adams Co. v. Eklund (1915), 89 Conn. 232, 93 Atl. 524; Collerd v. Tully (1911), 78 N. J. Law 557, 80 Atl. 491; Dube v. Liberty Clothing Co. (1915), 191 Misc. 64, 153 N. Y. Supp. 577; Schanz v. Bramwell (1913), 143 N. Y. Supp. 1057.

*Section 23.* B. & O. S. W. Ry. Co. v. Good (1910), 82 Ohio St. 278, 92 N. E. 435; Cincinnati Supply Co. v. Hartlieb (1914), 214 Fed. 177; Webster Milling Co. v. Bingham (1912), 14 Ariz. 50, 125 Pac. 709; Maley-Thompson & Moffett Co. v. Thos. Forman Co. (1914), 179 Mich. 548, 146 N. W. 95; Phelps v. McQuade (1913), 158 App. Div. 528, 146 N. Y. Supp. 822; Reichard v. Hutton (1913), 158 App. Div. 122, 142 N. Y. Supp. 935; L. C. Smith & Bros. Typewriter Co. v. Luebkeman (1911), 147 Wis. 317, 133 N. W. 33.

*Section 25.* Hallet & Davis Piano Co. v. Starr Piano Co. (1911), 85 Ohio St. 196, 97 N. E. 377.

*Section 26.* Nolte v. Winstanley (1914), 16 Ariz. 327, 145 Pac. 246; Patchin v. Rowell (1912), 86 Conn. 372, 85 Atl. 511.

*Section 28.* Roland M. Baker Co. v. Brown (1913), 214 Mass. 196, 100 N. E. 1025; *In re Richheimer* (1915), 221 Fed. 16.

*Section 31.* Brown v. Floersheim Mercantile Co. (1910), 206 Mass. 373, 92 N. E. 494.

*Section 33.* Rummell v. Blanchard (1915), 216 N. Y. 348, 110 N. E. 765.

*Section 34.* Brown v. Floersheim Mercantile Co. (1910), 206 Mass. 373, 92 N. E. 494.

*Section 38.* Roland M. Baker Co. v. Brown (1913), 214 Mass. 196, 100 N. E. 1025; Commercial Nat'l Bank v. Canal La. Bank (1916), 239 U. S. 520, 36 Sup. Ct. Rep. 194.

*Section 41.* Nat. Contracting Co. v. Vulcanite Portland Cement Co. (1906), 192 Mass. 247, 78 N. E. 414; Fullam v. Wright & Colton Wire Cloth Co. (1907), 196 Mass. 474, 82 N. E. 711; Haynes v. Temple (1908), 198 Mass. 372, 84 N. E. 467; Levy v. Dettra & Co. (1915), 91 Misc. 41, 154 N. Y. Supp. 176.

*Section 42.* Bridgeport Hardware Mfg. Co. v. Bounio (1915), 89 Conn. 254, 93 Atl. 674; Dame v. C. H. Hanson & Co. (1912), 212 Mass. 124, 98 N. E. 589; Gruen v. Geo. A. Ohl Co. (1917), 81 N. J. Law 626, 80 Atl. 547; British Aluminum Co. v. Trefts (1914), 163 App. Div. 184, 148 N. Y. Supp. 144.

*Section 43.* Loomis v. Norman Printers Sup. Co. (1908), 81 Conn. 343, 71 Atl. 358; Harlow v. Parsons Lbr. & Hdwe. Co. (1908), 81 Conn. 572, 71 Atl. 734; Bridgeport Hdwe. Mfg. v. Bounio (1915), 89 Conn. 254, 93 Atl. 674; Barrie v. Quimby (1910), 206 Mass. 259, 92 N. E. 451; New England Concrete Cons. Co. v. Shepard & Morse Lbr. Co. (1915), 220 Mass. 207, 107 N. E. 917; Schneider v. C. H. Little Co. (1915), 184 Mich. 315, 151 N. W. 587; Gruen v. Geo. A. Ohl & Co. (1911), 81 N. J. Law 626, 80 Atl. 547; Dordoni v. Hughes (1912), 83 N. J. Law 355, 85 Atl. 353; Stephens, Adamson Mfg. Co. v. Bigelow (1914), 86 N. J. Law 707, 92 Atl. 398; Geo. Leuders & Co. v. Fahlberg Saccharine Works (1914), 150 N. Y. Supp. 635; Schaffer v. Vandewater Co. (1914), 160 App. Div. 803, 145 N. Y. Supp. 769; Schiff v. Winton Motor Car Co. (1915), 90 Misc. 590, 153 N. Y. Supp. 961; Dressler-Beard Mfg. Co. v. Winter-Garden Co. (1916), 158 N. Y. Supp. 875; Hirsch v. Georgia Iron & Coal Co. (1909), 169 Fed. 578; National Cash Reg. Co. v. Brainsen (1915), 37 R. I. 462, 93

sequential in our modern states is apparent from all our legislative history. Legislatures commonly meet every two years, and Congress meets every year for the avowed purpose of enacting new laws as well as for the purpose of providing appropria-

Atl. 645; Gehl v. Peyke Bros. Commission Co. (1914), 158 Wis. 494, 149 N. W. 275.

*Section 44.* Boyd v. Second Hand Supply Co. (1912), 14 Ariz. 36, 123 Pac. 619; Powers v. Dodgson (Mich. 1916), 160 N. W. 432; Pancast v. Industrial Glass Co. (1911), 148 App. Div. 473, 132 N. Y. Supp. 821; Hall v. New Hartford Canning Co. (1912), 153 App. Div. 562, 138 N. Y. Supp. 866; Seaboard Brick Co. v. Bonacci (1912), 153 App. Div. 43, 137 N. Y. Supp. 1026; Munroe et al. v. Trenton Oil Cloth & Linoleum Co. (1913), 206 Fed. 456; Kirshman v. Crawford-Plummer Co. (1914), 165 App. Div. 259, 150 N. Y. Supp. 886; Galland v. Kass (1915), 152 N. Y. Supp. 1074; List & Son Co. v. Chase (1909), 80 Ohio St. 42, 88 N. E. 120; Snyder v. Rosenbaum (1909), 215 U. S. 261, 54 L. Ed. 186, 30 Sup. Ct Rep. 73; Shipton v. Weil (1912), 1 K. B. 574.

*Section 45.* Home Pattern Co. v. Mertz Co. (1914), 88 Conn. 22, 90 Atl. 33; Quarton v. Am. Law Book Co. (1909), 143 Iowa 517, 121 N. W. 1009; Hazel Hill Canning Co. v. Roberts (Md. 1916), 99 Atl. 424; National Contracting Co. v. Vulcanite Portland Cement Co. (1906), 192 Mass. 247, 78 N. E. 414; Haynes v. Temple (1908), 198 Mass. 372, 84 N. E. 467; Cumberland Glass Mfg. Co. v. Wheaton (1911), 208 Mass. 425, 94 N. E. 803; Craig v. Lane (1912), 212 Mass. 195, 98 N. E. 685; Bullard v. Eames (1914), 249 Mass. 49, 106 N. E. 584; Stevens v. Forrest (1914), 183 Mich. 223, 149 N. W. 982; Commercial Casualty Co. v. Rice (1916), 93 Misc. 567, 157 N. Y. Supp. 1; Empire Rubber Mfg. Co. v. Morris (1909), 77 N. J. Law 498, 72 Atl. 1009; Corey Co. v. Minch (1912), 82 N. J. Law 223, 82 Atl. 304; Dupont v. United Zink Co. (1914), 85 N. J. Law 416, 89 Atl. 992; Thos. Gordon Malting Co. v. Bartels Brewing Co. (1912), 206 N. Y. 528, 100 N. E. 461; Interboro Brewing Co. v. Independent Ice Co. (1915), 93 Misc. 24, 156 N. Y. Supp. 410; B. & O. R. R. Co. v. Lowenstein (1916), 171 App. Div. 137, 157 N. Y. Supp. 5; Petersburg Fire Brick & Tile Co. v. Am. Clay Mach. Co. (1914), 89 Ohio St. 365, 106 N. E. 33.

*Section 46.* Bay State Paper Co. v. Duggan (1913), 214 Mass. 166, 100 N. E. 1083; Miller v. Harvey (1913), 83 Misc. 59, 144 N. Y. Supp. 624; Schanz v. Bramwell (1913), 143 N. Y. Supp. 1057; Hauptman v. Miller (1916), 94 Misc. 266, 157 N. Y. Supp. 1104; Conroy v. Barrett (1916), 95 Misc. 247, 158 N. Y. Supp. 549; State v. Bayer (1915), 93 Ohio St. 72, 112 N. E. 197; United States v. R. P. Andrews & Co. (1907), 207 U. S. 229, 52 L. Ed. 185, 28 Sup. Ct. Rep. 100; Wimble v. Rosenberg, 57 Sol. J. 392.

*Section 47.* Alamo Cattle Co. v. Hall (1915), 220 Fed. 832; Urbansky v. Kutinsky (1912), 86 Conn. 22, 84 Atl. 317; Bridgeport Hardware Mfg. Co. v. Bouniol (1915), 89 Conn. 254, 93 Atl. 674; Garvan v. N. Y. C. & H. R. R. R. Co. (1911), 210 Mass. 275, 96 N. E. 717; Mosler Safe Co. v. Thore (1914), 217 Mass. 153, 104 N. E. 574; H. H. Hottler Lumber Co. v. Olds (1915), 221 Fed. 612; Paul Gerli & Co. v. Mistletoe Silk Mills (1910), 80 N. J. Law 128, 76 Atl. 335; Northern Grain Co. v. Wiffler (1915), 168 App. Div. 95, 153 N. Y. Supp. 723; Ft. Wayne Co. v. Hurley Reilly Co. (1916), 163 Wis. 179, 157 N. W. 773; Delaware L. & W. R. R. Co. v. U. S. (1913), 231 U. S. 363, 58 L. Ed. 269, 34 Sup. Ct. Rep. 65.

*Section 48.* Emery Thompson etc. Co. v. Graves (Conn. 1916), 98 Atl. 331; DeNunzio v. DeNunzio (Conn. 1916), 97 Atl. 323; Puffer Mfg. Co. v. Krum (1911), 210 Mass. 211, 96 N. E. 139; Am. Steam Gauge & Valve Co. v. Mechanics Iron Foundry Co. (1913), 214 Mass. 299, 101 N. E. 376; Emert v. Nibbink (1914), 179 Mich. 335, 146 N. W. 120; Paul Gerli & Co. v. Mistletoe Silk Mills (1910), 80 N. J. Law 128, 76 Atl. 335; Otis Elevator Co. v. Headley (1911), 81 N. J. Law 173, 80 Atl. 109; Paul Gerli & Co.

tions to carry on the governmental machinery. At every session of these bodies new laws of one kind or another are passed. If these laws are desirable as a matter of intrinsic merit in the situation to which they are to be applied, the mere fact that they change the pre-existing law is not allowed to stand in the

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v. Mistletoe Silk Mills (1912), 83 N. J. Law 7, 84 Atl. 1065; Hayes v. Kluge (1914), 86 N. J. Law 657, 92 Atl. 358; Wurlitzer Mfg. Co. v. United R. & A. Co. (1915), 87 N. J. Law 656, 94 Atl. 630; White v. Schweitzer (1911), 147 App. Div. 544, 132 N. Y. Supp. 644; Salomon v. Olkin (1915), 91 Misc. 17, 155 N. Y. Supp. 348; Schindler v. Olkin (1915), 155 N. Y. 348; Silberstein v. Blum (1915), 167 N. Y. App. 660, 153 N. Y. Supp. 34; Marmet Coal Co. v. People's Coal Co. (1915), 226 Fed. 646; Ohio Electric Co. v. Wisconsin-Minnesota Light & Power Co. (1915), 161 Wis. 632, 155 N. W. 112; Ft. Wayne Printing Co. v. Hurley-Reilly Co. (1916), 163 Wis. 179, 157 N. W. 773.

*Section 49.* Borden v. Fine (1912), 212 Mass. 425, 98 N. E. 1073; Gascoigne v. Cary Brick Co. (1914), 217 Mass. 302, 104 N. E. 734; Louis Eckels & Sons Ice Mfg. Co. v. Cornell Economizer Co. (1912), 119 Md. 107, 86 Atl. 38; Rittenhouse-Winterson Auto Kissner (Md. 1916), 98 Atl. 361; Wolverine Spice Co. v. Fallas (1914), 182 Mich. 361, 148 N. W. 701; Hayes v. Kluge (1914), 86 N. J. Law 657, 92 Atl. 358; Ferguson v. Netter (1912), 204 N. Y. 505, 98 N. E. 16; H. Koehler & Co. v. York Mfg. Co. (1911), 193 Fed. 981; R. Young Bros. Feed Co. v. Seymour (1912), 151 App. Div. 549, 136 N. Y. Supp. 80; Condict v. Onward Const. Co. (1913), 210 N. Y. 88, 103 N. E. 886; Marx v. Locomobile Co. (1913), 82 Misc. 468, 144 N. Y. Supp. 937; Nelson Co. v. Silver (1913), 160 App. Div. 445, 145 N. Y. Supp. 124; Leiter v. Innis etc. Co. (1912), 138 N. Y. Supp. 536; Powell v. New England Cotton Yarn Co. (1913), 154 App. Div. 875, 139 N. Y. Supp. 569; Rich v. Minolfi (1913), 157 App. Div. 783, 142 N. Y. Supp. 771; Rothenberg v. Shapiro (1913), 140 N. Y. Supp. 148; Shearer Co. v. Kakoulis (1913), 144 N. Y. Supp. 1077; Standard Milling Co. v. DePass (1913), 154 App. Div. 525, 139 N. Y. Supp. 611; Buffalo Wholesale Hardware Co. v. Hodgeboom (1915), 90 Misc. 53, 152 N. Y. Supp. 900; Levy v. John C. Dettra Co. (1915), 91 Misc. 41, 154 N. Y. Supp. 176; Interboro Brewing Co. v. Independent Ice Co. (1915), 93 Misc. 24, 156 N. Y. Supp. 410; Kugelan v. Ritter (1915), 90 Misc. 279, 152 N. Y. Supp. 1027; Peuser v. Marsh (1916), 167 N. Y. 604, 113 N. E. 494, 154 N. Y. Supp. 888; Salomon v. Olkin (1915), 91 Misc. 17, 154 N. Y. Supp. 204; Schindler v. Sperling (1915), 155 N. Y. Supp. 348; Silberstein v. Blum (1915), 167 N. Y. 660, 153 N. Y. Supp. 34; English Lumber Co. v. Smith (1916), 157 N. Y. Supp. 233; Regina Co. v. Gately Furniture Co. (1916), 171 App. Div. 817, 157 N. Y. Supp. 746; Marmet Coal Co. v. People's Coal Co. (1915), 226 Fed. 646; Spaulding v. Howard (Okla. 1915), 152 Pac. 106; Oscar Smith & Sons Co. v. Janesville Batting Mills Co. (1912), 150 Wis. 528, 137 N. W. 966.

*Section 50.* Putnam v. Bolster (1914), 216 Mass. 367, 103 N. E. 942; Descalzi Fruit Co. v. Wm. S. Sweet & Son (1910), 30 R. I. 320, 75 Atl. 308.

*Section 51.* House Cold Tire Setter Co. v. Graham (1910), 83 Conn. 31, 75 Atl. 80; Barrie v. Quimby (1910), 206 Mass. 259, 92 N. E. 451; Gourd v. Healy (1912), 206 N. Y. 423, 99 N. E. 1099; Wester v. Casein Co. of America (1912), 206 N. Y. 506, 100 N. E. 488; Roppenberg v. Owen & Co. (1914), 84 Misc. 126, 146 N. Y. Supp. 478; Ulster Brick Co. v. Murtha & Schmohl Co. (1915), 169 N. Y. App. Div. 151, 154 N. Y. Supp. 834.

*Section 53.* Urbansky v. Kutinsky (1912), 86 Conn. 22, 84 Atl. 317; Capuano v. Italian Importing Co. (1915), 89 Misc. 449, 151 N. Y. Supp. 994.

way of their enactment. Such being the situation in regard to proposed legislation generally, the mere fear that the Uniform Sales Act might change some existing law should not be regarded as intrinsically important, unless definite objections appear to the changes actually brought about.

*Section 54.* Urbansky v. Kutinsky (1912), 86 Conn. 22, 84 Atl. 317; Norfolk Hardwe. Co. v. N. Y. C. & H. R. R. Co. (1909), 202 Mass. 160, 88 N. E. 664; Wright v. Frank A. Andrews Co. (1912), 212 Mass. 186, 98 N. E. 798; Rummell v. Blanchard (1915), 216 N. Y. 348, 110 N. E. 765.

*Section 56.* Urbansky v. Kutinsky (1912), 86 Conn. 22, 84 Atl. 317; Capuano v. Italian Importing Co. (1915), 89 Misc. 449, 151 N. Y. Supp. 994; Northern Grain Co. v. Wiffler (1915), 168 App. Div. 95, 153 N. Y. Supp. 723; Rummell v. Blanchard (1915), 167 App. Div. 654, 153 N. Y. Supp. 159.

*Section 57.* Boyd v. Second Hand Supply Co. (1912), 14 Ariz. 36, 123 Pac. 619; Coleman v. N. Y., N. H. & H. R. R. Co. (1913), 215 Mass. 45, 102 N. E. 92; Gass v. Southern Pacific Co. (1912), 152 App. Div. 412, 137 N. Y. Supp. 261; Northern Grain Co. v. Wiffler (1915), 168 App. Div. 95, 153 N. Y. Supp. 723.

*Section 58.* Norfolk Hardwood Co. v. N. Y. C. & H. R. R. Co. (1909), 202 Mass. 160, 88 N. E. 664; Coleman v. N. Y., N. H. & H. R. R. Co. (1913), 215 Mass. 45 102 N. E. 92; Northern Grain Co. v. Wiffler (1915), 168 App. Div. 95, 153 N. Y. Supp. 723; Rummell v. Blanchard (1915), 216 N. Y. 348, 110 N. E. 765.

*Section 59.* Northern Grain Co. v. Wiffler (1915), 168 App. Div. 95, 153 N. Y. Supp. 723.

*Section 60.* Churchill Grain Co. v. Newton (1914), 88 Conn. 130, 89 Atl. 1121; Urbansky v. Kutinsky (1912), 86 Conn. 22, 84 Atl. 317; Putnam v. Bolster (1914), 216 Mass. 367, 103 N. E. 942; Dudley A. Tyng & Co. v. Woodward (1913), 121 Md. 422, 88 Atl. 243; Woodward v. Dudley A. Tyng Co. (1914), 123 Md. 98, 91 Atl. 166; Rylance v. James Walker Co. (Md. 1916), 99 Atl. 597; Storm v. Rosenthal (1913), 156 App. Div. 544, 141 N. Y. Supp. 339; Haueter v. Marty (1914), 156 Wis. 208, 145 N. W. 775.

*Section 61.* Boyd v. Second Hand Supply Co. (1912), 14 Ariz. 36, 123 Pac. 619; Dudley A. Tyng Co. v. Woodward (1913), 121 Md. 422, 88 Atl. 243; Wright v. Frank A. Andrews Co. (1912), 212 Mass. 186, 98 N. E. 798; Ullman v. C. C. Wormer Machinery Co. (1913), 210 N. Y. 41, 103 N. E. 766; Capuano v. Italian Importing Co. (1915), 89 Misc. 449, 151 N. Y. Supp. 994; Berry v. Wadham's Oil Co. (1914), 156 Wis. 588, 146 N. W. 783.

*Section 62.* Northern Grain Co. v. Wiffler (1915), 168 App. Div. 95, 153 N. Y. Supp. 723; Rummell v. Blanchard (1915), 167 App. Div. 654, 153 N. Y. Supp. 159; Urbansky v. Kutinsky (1912), 86 Conn. 22, 84 Atl. 317; Mordaunt v. British Oil & Coke Mills, [1910] 2 K. B. 502.

*Section 63.* Illustrated Postal Card & Novelty Co. v. Holt (1912), 85 Conn. 140, 81 Atl. 1061; Urbansky v. Kutinsky (1912), 86 Conn. 22, 84 Atl. 317; Home Pattern Co. v. W. W. Mertz Co. (1913), 86 Conn. 494, 86 Atl. 19; Home Pattern Co. v. Mertz (1914), 88 Conn. 22, 90 Atl. 33; United Machinery Co. v. M. Etzel & Sons (1915), 89 Conn. 336, 94 Atl. 356; Rylance v. James Walker Co. (Md. 1916), 99 Atl. 597; Rice v. Dinsmore (1915), 124 Md. 276, 92 Atl. 847; Bellows v. McKensie (1912), 212 Mass. 601, 99 N. E. 470; Burroughs Adding Machine Co. v. Mt. Auburn Cemetery (1914), 217 Mass. 378, 104 N. E. 744; Whitcomb v. Boston Dairy Co. (1914), 218 Mass. 24, 105 N. E. 554; R. C. Bartley Co. v. Lee (1915), 87 N. J. Law 19, 93 Atl. 78; Praeger v. Emer.-Brantingham Imp. Co. (1914), 122 Md. 303, 89 Atl. 501; Gourd v. Healy (1912), 206 N. Y. 423, 99 N. E. 1099; Wyllis Co. v. Nixon (1914), 165 App. Div. 373, 150 N. Y. Supp. 944; Haeuter v. Marty (1914), 156 Wis. 208, 145 N. W. 775; Langer v. Finch (1915), 160

## CHANGES IN OUR PRESENT CODE.

The substantial changes are not numerous for most of the changes in our Code which would be produced by enactment of the Uniform Sales Act consist in repeals of the old sections in

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Wis. 668, 152 N. W. 416; Lipschitz v. Napa Fruit Co. (1915), 223 Fed. 698.

*Section 64.* Illustrated Postal Card & Novelty Co. v. Holt (1912), 85 Conn. 140, 81 Atl. 1061; Urbansky v. Kutinsky (1912), 86 Conn. 22, 84 Atl. 317; Home Pattern Co. v. W. W. Mertz Co. (1914), 86 Conn. 494, 86 Atl. 19; Churchill Grain & Seed Co. v. Newton (1914), 88 Conn. 130, 89 Atl. 1121; United Machinery Co. v. M. Etzel & Sons (1915), 89 Conn. 336, 94 Atl. 356; Moffatt v. Davitt (1909), 200 Mass. 452, 86 N. E. 929; Barrie v. Quintiny (1910), 206 Mass. 259, 92 N. E. 451; Hanson & Parker v. Wittenberg (1910), 205 Mass. 319, 91 N. E. 383; Cumberland Glass Co. v. Wheaton (1911), 208 Mass. 425, 94 N. E. 803; F. W. Stock & Sons v. Snell (1913), 213 Mass. 449, 100 N. E. 830; Raymond v. Phipps (1913), 215 Mass. 559, 102 N. E. 905; Bullard v. Eames (1914), 219 Mass. 49, 106 N. E. 584; Dimmick v. Hendley (1912), 117 Md. 458, 84 Atl. 171; Massman v. Steiger (1910), 79 N. J. Law 442, 75 Atl. 746; Bixler v. Finkle (1913), 85 N. J. Law 77, 88 Atl. 846; Skeele Coal Co. v. Arnold (1912), 200 Fed. 393; Stroock Plush Co. v. Talcott (1912), 150 App. Div. 343, 134 N. Y. Supp. 1052; Thos. Gordon Malting Co. v. Bartels Brewing Co. (1912), 206 N. Y. 528, 100 N. E. 461; Poel v. Brunswick-Balke-Collender Co. (1913), 159 App. Div. 365, 144 N. Y. Supp. 725; Storm v. Rosenthal (1913), 156 App. Div. 544, 141 N. Y. Supp. 339; Poppenberg v. R. M. Owen & Co. (1914), 84 Misc. 126, 146 N. Y. Supp. 478; Whitcomb v. Shultz (1914), 215 Fed. 75; Galland v. Kass (1915), 152 N. Y. Supp. 1074; Riegel Sack C. v. Tidewater Portland Cement Co. (1916), 95 Misc. 202, 158 N. Y. Supp. 954; Varley v. Belford (1916), 156 N. Y. Supp. 597; Yates v. Whely Coke Co. (1915), 221 Fed. 603; J. B. Bradford Piano Co. v. Hacker (Wis. 1916), 156 N. W. 140.

*Section 65.* Wetopsky v. New Haven Gaslight Co. (Conn. 1916), 96 Atl. 950; Sullivan v. Boswell (1914), 122 Md. 539, 89 Atl. 940.

*Section 66.* Brown v. Sallinger (1913), 214 Mass. 245, 101 N. E. 382; Hetson v. Brolnitsky (1915), 153 N. Y. Supp. 1029.

*Section 67.* Arizona Power Co. v. Racine-Sattley Co. (1911), 13 Ariz. 283, 114 Pac. 558; McFadden v. Shanley (1914), 16 Ariz. 91, 141 Pac. 732; Banks v. Warner (1912), 85 Conn. 613, 84 Atl. 325; Dudley A. Tyng & Co. v. Woodward (1913), 121 Md. 422, 88 Atl. 243; Sullivan v. Boswell (1914), 122 Md. 539, 89 Atl. 940; Westminister Metal & Foundry Co. v. Coffman (1914), 123 Md. 619, 91 Atl. 716; Rylance v. James Walker Co. (1916), 99 Atl. 597; Hanson & Parker v. Wittenberg (1910), 205 Mass. 319, 91 N. E. 383; Chandler Grain & Milling Co. v. Shea (1913), 213 Mass. 398, 100 N. E. 663; Brown v. Sallinger (1913), 214 Mass. 245, 101 N. E. 382; Sauer v. McClinic-Marshall Cons. Co. (1914), 179 Mich. 618, 146 N. W. 422; U. S. Commercial Co. v. Joachimstahl (1909), 72 Atl. 46; Berg v. Rapid Motor Vehicle Co. (1910), 78 N. J. Law 724, 75 Atl. 933; Gruen v. Geo. A. Ohl & Co. (1911), 81 N. J. Law 626, 80 Atl. 547; Pope v. Ferguson (1912), 82 N. J. Law 566, 83 Atl. 353; Rockwell v. Am. Law Book Co. (1916), 76 Atl. 334; H. Koehler & Co. v. York Mfg. Co. (1912), 193 Fed. 981; Seaboard Brick Co. v. Bonacci (1912), 153 App. Div. 43, 137 N. Y. Supp. 1026; Rice Co. v. Hoffman-Youmans' Mills (1913), 158 App. Div. 309, 143 N. Y. Supp. 249; International Paper Co. v. Rockefeller (1914), 161 App. Div. 180, 146 N. Y. Supp. 371; Langstroth v. Turner Cypress Lbr. Co. (1914), 162 App. Div. 818, 148 N. Y. Supp. 224; Fowler v. Gress Mfg. Co. (1916), 95 Misc. 650, 158 N. Y. Supp. 524; Sterling Coal Co. v. Silver Spring Bleaching & D. Co. (1908), 162 Fed. 848; Pope Metals Co. v.

regard to sales, most of which are contained in the Uniform Sales Act in substantially the same form, or in a more satisfactory form because more specific. Definite repeal of such sections is desirable, however, in order to prevent the contingency of litig-

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Sadek (1912), 149 Wis. 394, 135 N. W. 851; Birdsong & Co. Inc. v. Marty (1916), 158 N. W. 289.

*Section 68.* Halstead v. Schnitzpahn (1915), 152 N. Y. Supp. 561.

*Section 69.* Woodbridge Ice Co. v. Ice Cream Corp. (1909), 81 Conn. 479, 71 Atl. 577; Coast Central Milling Co. v. Russell Lumber Co. (1914), 89 Atl. 898; Norwood Paper Co. v. Columbia Paper Bag Co. (1911), 185 Fed. 454; Enterprise Mfg. Co. v. Oppenheim Oberndorf & Co. (1911), 114 Md. 368, 79 Atl. 1007; White Auto Co. v. Dorsey (1913), 119 Md. 251, 86 Atl. 617; Greer v. Whalen (1915), 125 Md. 273, 93 Atl. 521; Impervious Products Co. v. Gray (1915), 127 Md. 64; 96 Atl. 1; Puffer Mfg. Co. v. Krum (1911), 210 Mass. 211, 96 N. E. 139; Craig v. Lane (1912), 212 Mass. 195, 98 N. E. 685; Borden v. Fine (1912), 212 Mass. 425, 98 N. E. 1073; Collins v. Skillings (1916), 224 Mass. 275, 112 N. E. 938; Patterson v. Gore (1913), 177 Mich. 591, 143 N. W. 643; Powers v. Dodgson (1916), 177 Mich. 591, 160 N. W. 432; Erwin v. Detwiler (1907), 75 N. J. Law 420; 67 Atl. 932; Lissberger v. Kellogg (1909), 78 N. J. Law 85, 73 Atl. 67; Gerli & Co. v. Mistletoe Silk Mills (1910), 80 N. J. Law 128, 76 Atl. 335; Brown v. Nevins (1913), 84 N. J. Law 215, 86 Atl. 938; Cruver Mfg. Co. v. Spooner (1911), 147 App. Div. 471, 131 N. Y. Supp. 866; Freider v. Rosen (1914), 147 N. Y. Supp. 442; Scholpff v. Bender (1911), 147 App. Div. 894, 131 N. Y. Supp. 875; Stratton v. Spaeth (1911), 146 App. Div. 461, 131 N. Y. Supp. 333; Morse v. Canaswacta Knitting Co. (1912), 154 App. Div. 351, 139 N. Y. Supp. 634; Coble v. Potter (1913), 155 App. Div. 716; 140 N. Y. Supp. 855; Marx v. Locomobile Co. (1913), 82 Misc. 468, 144 N. Y. Supp. 937; Interboro Brewing Co. v. Independent Consumers Ice Co. (1913), 83 Misc. 119, 144 N. Y. Supp. 820; Powell v. New England Cotton Yarn Co. (1913), 154 App. Div. 875, 139 N. Y. Supp. 569; G. B. Shearer Co. v. Kakoulis (1913), 144 N. Y. Supp. 1077; Sturges & Burns Mfg. Co. v. Am. Separator Co. (1913), 158 App. Div. 63, 142 N. Y. Supp. 697; Clarke v. Schmidt (1914), 210 N. Y. 211, 104 N. E. 613; Miller v. Zander (1914), 85 Misc. 499, 147 N. Y. Supp. 479; Moran v. Standard Oil Co. (1914), 211 N. Y. 187, 105 N. E. 217; Buffalo Wholesale Hardware Co. v. Hodgeboom (1915), 90 Misc. 83, 152 N. Y. Supp. 900; Kennedy & Sons v. Perkins & Squire Co. (1915), 154 N. Y. Supp. 101; Levy v. Deltra & Co. (1915), 91 Misc. 41, 154 N. Y. Supp. 176; Peuser v. Marsh (1915), 167 N. Y. App. 604, 153 N. Y. Supp. 381; Regina Co. v. Gately Furniture Co. (1915), 154 N. Y. Supp. 888; Salomon v. Olkin (1915), 91 N. Y. 17, 154 N. Y. Supp. 204; Schandler v. Sperling (1915), 155 N. Y. Supp. 348; Silberstein v. Blum (1915), 167 App. Div. 660, 153 N. Y. Supp. 34; Smith v. Hedges (1915), 89 Misc. 183, 152 N. Y. Supp. 95; Shimel v. Williams Oven Mfg. Co. (1916), 93 Misc. 174, 156 N. Y. Supp. 1060; Fowler v. Gress Mfg. Co. (1916), 94 Misc. 650, 158 N. Y. Supp. 524; Boviard & Seyfang Mfg. Co. v. Maitland (1915), 92 Ohio 201, 110 N. E. 749; Lewiston Foundry & Machine Co. v. Hartford Stone Co. (1915), 92 Ohio 76, 110 N. E. 515; Marmet Coal Co. v. People's Coal Co. (1915), 226 Fed. 646; Descalzi Fruit Co. v. Wm. S. Sweet & Son (1910), 30 R. I. 320, 75 Atl. 308; Kelsey v. J. W. Ringrose Net Co. (1913), 152 Wis. 499, 140 N. W. 66.

*Section 70.* Glann v. White (1914), 181 Mich. 320, 148 N. W. 210; Deacon v. Horn & Co. (1915), 152 N. Y. Supp. 1073; Burnstein v. Phillips (1913), 154 Wis. 591, 143 N. W. 679.

*Section 71.* Re Walkers & Shaw, [1904] 2 K. B. 152.

*Section 74.* Pope v. Ferguson (1912), 82 N. J. Law 566, 83 Atl. 353; Felt v. Bush (1912), 41 Utah 462, 126 Pac. 688; Roland M. Baker Co. v.

gation on the question of which provision is to govern, in the event that a resourceful lawyer, by strained construction of the language employed, would find a question to raise on some old provision where the new statute was meant to cover the same ground.<sup>14</sup>

Brown (1913), 214 Mass. 196, 100 N. E. 1025; Commercial Nat'l Bank v. Canal La. Bank (1916), 239 U. S. 520, 60 L. Ed. 417, 36 Sup. Ct. 194.

In the last-mentioned case the Supreme Court of the United States speaking through Justice Hughes, says . . . . "it is urged that the new statute is but a step in the development of the law, and that decisions under former state statutes are safe guides to its construction. We do not find it necessary to review these decisions. It is apparent that if these uniform acts are construed in the several states adopting them according to former local views upon analogous subjects, we shall miss the desired uniformity and we shall erect upon the foundation of uniform language separate legal structures as distinct as were the former varying laws. It was to prevent this result that the . . . . Act expressly provides . . . . 'This Act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.' . . . . We think that the principle of the Uniform Act should have recognition to the exclusion of any inconsistent doctrine which may have previously obtained in any of the states enacting it. . . . ."

*Section 76.* Boyd v. Second Hand Supply Co. (1912), 14 Ariz. 36, 123 Pac. 619; Wetopsky v. New Haven Gas & Lt. Co. (1914), 88 Conn. 1, 90 Atl. 30; Merrill v. Hodson (1914), 88 Conn. 314, 91 Atl. 533; Willard v. Higdon (1914), 123 Md. 447, 91 Atl. 577; Coleman v. N. Y., N. H. & H. R. R. Co. (1913), 215 Mass. 45, 102 N. E. 92; Wooley v. Crescent Auto Co. (1912), 83 N. J. Law 244, 83 Atl. 876; Buffalo Wholesale Hardware Co. v. Hodgeboom (1915), 90 Misc. 53, 152 N. Y. Supp. 900; Davis Laundry & Cleaning Co. v. Whitmore (1915), 92 Ohio 44, 110 N. E. 518.

<sup>14</sup> The provisions of the Code which should be repealed in accordance with this view are for the sake of completeness and convenience here enumerated. In North Dakota, the repeals have already been made in connection with the adoption there of the Uniform Sales Act. Where the provisions which should be repealed are substantially re-enacted in the Uniform Sales Act they appear in this enumeration simply under their respective section numbers. Where they are inconsistent with the Uniform Sales Act, a star is appended to the section numbers, in order at a glance to indicate the distinction.

California.	Montana.	No. Dakota.	So. Dakota.
*1141	*4633		* 951
*1624 (4)	*5017 (4)	*5888 (4)	*1238 (4)
1721	5079	5950	1299
1722	5080	5951	1300
1726	5081	5952	1301
1727	5082	5953	1302
1728	5083	5954	1303
1729	5084	5955	1304
1730	5085	5956	1305
*1739	*5089	*5961	*1309
1740	5090	5962	1310
1748	5095	5965	1313
*1749	*5096	*5966	*1314
1753	5097	5967	1316
1754	5098	5968	1317
1755	5099	5969	1318
1756	5100	5970	1319
1757	5101	5971	1320
1758	5102	5972	1321

A few more substantial changes in our Code would be made in the cases where the rules embodied in the Uniform Sales Act differ affirmatively from rules on the same questions found in the Code. The principal changes of this character relate to the law of warranty in sales, with a few minor changes in regard to the Statute of Frauds, manner of enforcement of the seller's lien, seller's right to recover the price, auctions, infant's right to avoid a sale, and sales at a valuation, all of which are dealt with below in turn.

From this cursory view, it is apparent that the affirmative changes in our Code which would be produced by the adoption of the Uniform Sales Act are relatively insignificant. Aside

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California.	Montana.	No. Dakota.	So. Dakota.
1763	5103	5973	1322
1764	5104	5974	1323
1765	5105	5975	1324
1766	5106	5976	1325
*1767	*5107	*5977	*1326
*1768	*5108	*5978	*1327
*1769	*5109	*5979	*1328
*1770	*5110	*5980	*1329
*1771	*5111	*5981	*1330
1772	5112	5982	1331
*1773	*5113	*5983	*1332
*1774	*5114	*5984	*1333
*1775	*5115	*5985	*1334
1777	5117	5987	1336
*1778	*5118	*5988	*1337
1784	5119	5989	1338
1785	5120	5990	1339
*1786	*5121	*5994	*1340
1792	5122	5995	1341
1793	5123	5996	1342
1794	5124	5997	1343
*1795	*5125	*5998	*1344
1796	5126	5999	1345
1797	5127	6000	1346
*1798	*5128	*6001	*1347
1804	5129	6003	1348
1805	5130	6004	1349
1806	5131	6005	1350
*3049	*5803		*2151
3076	5837	6881	2163
3077	5838	6882	2164
3078	5839	6883	2165
3079	5840	6884	2166
3080	5841	6885	
3308	6056	7153	2300
3309	6057	7154	2301
3310	6058	7155	2302
*3311	*6059	*7156	*2303
3312	6060	7157	2304
3313	6061	7158	2305
3314	6062	7159	2306

from the few mentioned changes, most of which are of a minor character, the Uniform Sales Act either re-enacts more specifically the law we already have in our Code in more indefinite form, or it definitely specifies, on the basis of the generally prevailing common law, rules of law to cover numerous situations often arising which are not even touched by the provisions in our Code.

That the changes made in our Code by the Uniform Sales Act are not radical may be inferred, even without any minute comparison of the detailed provisions, from the fact that the Uniform Sales Act is a careful codification of the common law prevailing generally in this country, based throughout on decided cases. Our Code, also, is an attempt to codify the common law. Both, then, rest upon the same basic foundation and depend for their underlying principles on the same body of case law. The Uniform Sales Act, to be sure, is a more recent codification, and includes much matter drawn from cases decided since the Field Codes were drafted. Those new cases, however, were decided according to common law principles, deduced from the pre-existing authorities, and introducing nothing strange and startling into the law. It is, therefore, no accident, but a natural consequence, that even close comparison between the Uniform Sales Act and our present Code discloses few marked diversities between them, though it does disclose very conspicuously that the Uniform Sales Act is much more complete and specific in its provisions. Even in the few cases where substantial affirmative changes are made in the Code by the Uniform Sales Act, it may be inferred, in the light of these facts, that the changes are not of a startling but of a very moderate character.

A little detailed examination of these changes will confirm the conclusion that the changes in question are not radical, and that they are usually worth making on their own merits, even apart from the question whether the Uniform Sales Act should be adopted to secure uniformity and certainty generally.

*The law of warranty.*—Section 15 of the Uniform Sales Act produces a more marked change in our Code than any of the other sections. Even in this section, which deals with implied warranties of quality, the general manner of dealing with the question is the same as in our Code, namely, that there is no

implied warranty, apart from the classes especially dealt with in the statute. The classes, however, are somewhat different. Under some sections of our Code the warranty dealt with is confined to the manufacturer.<sup>15</sup> Under section 15 (subdivision 1) of the Uniform Sales Act, the warranty is implied in a sale, whether the seller is a manufacturer or not, if the buyer relies on the seller's skill and judgment. Section 15 (subdivision 2) of the Uniform Sales Act, on warranty in a sale by description, changes our Code<sup>16</sup> by leaving out any reference to deterioration after shipment and changes it also by making the warranty apply, regardless of whether the buyer of provisions buys for immediate consumption or for re-sale. Section 15 (subdivision 3) of the Uniform Sales Act changes the law of our Code<sup>17</sup> by referring only to actual examination of the goods instead of opportunity to examine. Sections 12 and 15 (subdivision 1) of the Uniform Sales Act also modify our Code<sup>18</sup> by permitting a warranty against known defects if the buyer relies upon the seller's skill and judgment in the matter. This is often important in cases of doubt and difficulty on the part of the buyer in regard to appreciating the seriousness of defects.

Our Code<sup>19</sup> provides that a breach of warranty entitles the buyer to rescind a contract of sale but not an executed sale, "unless the warranty was intended by the parties to operate as a condition." It has been difficult under this section to determine what the qualification meant.<sup>20</sup> It is a better rule, on the merits,

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<sup>15</sup> Cal. Civ. Code, §§ 1769-70; Revised Codes of Montana, §§ 5109-10; Compiled Laws of North Dakota, §§ 5979-80; Compiled Laws of South Dakota, vol. 2, §§ 1328-9.

<sup>16</sup> Cal. Civ. Code, § 1768, 1771, 1775; Revised Codes of Montana, §§ 5108, 5111, 5115; Compiled Laws of North Dakota, 5978, 5981, 5985; compiled laws of South Dakota, vol. 2, §§ 1327, 1330, 1334.

<sup>17</sup> Cal. Civ. Code, § 1771; Revised Codes of Montana, § 5111; Compiled Laws of North Dakota, § 5981; Compiled Laws of South Dakota, vol. 2, § 1330.

<sup>18</sup> Cal. Civ. Code, § 1778; Revised Codes of Montana, § 5118; Compiled Laws of North Dakota, § 5988; Compiled Laws of South Dakota, vol. 2, § 1337.

<sup>19</sup> Cal. Civ. Code, § 1786; Revised Codes of Montana, § 5121; Compiled Laws of North Dakota, § 5994; Compiled Laws of South Dakota, vol. 2, § 1340.

<sup>20</sup> See *Luitweiler Pumping Engine Company v. Ukiah Water and Improvement Company* (1911), 16 Cal. App. 198, 116 Pac. 707; *Harron, Rickard & McCone v. Sisk* (1912), 19 Cal. App. 628, 127 Pac. 355; *Pepper v. Vedova* (1915), 26 Cal. App. 406, 147 Pac. 105; *Doornbos v. Thomas* (1915), 50 Mont. 370, 147 Pac. 277; *Keeney v. City of Fargo* (1905), 14 N. D. 419, 105 N. W. 92; *Westby v. Case Threshing Mach. Co.* (1911), 21 N. D. 575, 132 N. W. 137; *Elliott Supply Co. v. Johnson* (1916), 34 N. D.

to let the buyer rescind either a contract of sale or an executed sale, if there is a breach of warranty. That leaves the question of rescission to depend alone on the question whether the warranty has been broken, a result which is far preferable since the questions of what conditions were intended to be included and just at what moment title was intended to pass are often obscure, the parties in their bargain not having adverted specifically to those matters at all. This section of our Code would be changed by the Uniform Sales Act, section 69 (subdivision 1, d) letting the buyer, at his election, rescind or sue for breach of warranty, whether title has passed or not.

The Uniform Sales Act would also cause the repeal of the section in our Code imposing upon the seller an implied warranty of good faith.<sup>21</sup> This section is in part covered by section 15 (subdivision 1) of the Uniform Sales Act, but not as to the seller's warranting his own good faith in the transaction. Such an implied warranty is unnecessary, since bad faith here would in any case give rise to a cause of action for fraud, and unless there was bad faith, there would be no breach of warranty under this section. Such a warranty, too, is unknown to the common law of sales, and was equally unknown at the time it was originally introduced into the Field Codes. Further, no case involving any warranty in sales of goods under this section has arisen in the fifty odd years of this section's useless existence on the statute book. It would therefore do no violence to the law to have it repealed without substantial re-enactment in the Uniform Sales Act.

The Uniform Sales Act would also repeal the section in our Code<sup>22</sup> imposing an implied warranty of the truth of marks of quantity or quality. This section is reasonably covered by section 14 of the Uniform Sales Act if the sale is by description, and is also partly covered by section 15 (subdivisions 1 and 2). So far as our Code section goes beyond those portions of the Uniform Sales Act, it is either unimportant or mischievous,

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632, 159 N. W. 2. With the repeal of this section of our Code these cases would on this question also become obsolete.

<sup>21</sup> Cal. Civ. Code, § 1767; Revised Codes of Montana, § 5107; Compiled Laws of North Dakota, § 5977; Compiled Laws of South Dakota, vol. 2, § 1326.

<sup>22</sup> Cal. Civ. Code, § 1773; Revised Codes of Montana, § 5113; Compiled Laws of North Dakota, § 5983; Compiled Laws of South Dakota, vol. 2, § 1332.

since the marks referred to may be wholly immaterial, forming no part of the description or of the inducement to buy, and being in no wise relied on. Further, its unimportance is shown by the fact that since the Field Code was adopted no cases have been decided in reliance on this section.

The section in our Code<sup>23</sup> dealing with warranties on sale of a written instrument is not contained in any corresponding form in the Uniform Sales Act. It may be properly omitted from the sections of the statute relating to sale, however, since it deals with commercial paper only, was drafted as a codification of some cases relating to negotiable instruments<sup>24</sup> and is substantially contained in the Negotiable Instruments Law<sup>25</sup> which has now been adopted in all four of the code states.<sup>26</sup>

The general effect, then, of these changes in the law of warranty is to make the law of warranty somewhat more stringent on the seller than before. This is quite in accord with the tendency shown at common law in more recent times, as well as with the tendency shown in some recent legislation.<sup>27</sup> It will be remembered that in the earlier common law the law of implied warranty was very much restricted, and that, as time has gone on, its range has been more and more extended. The Uniform Sales Act, being based on the common law of the present, goes

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<sup>23</sup> Cal. Civ. Code, § 1774; Revised Codes of Montana, § 5114; Compiled Laws of North Dakota, § 5984; Compiled Laws of South Dakota, vol. 2, § 1333.

<sup>24</sup> In the Commissioners' note to the original draft Civil Code of New York (The Field Code) the cases cited do not stand squarely for any such proposition as they are cited to support. In only one of them, *Brown v. Montgomery* (1859), 20 N. Y. 287, does even the language measurably bear it out, and that is a case of negotiable instruments which cites *Story on Promissory Notes*, § 118 for its support.

<sup>25</sup> §§ 65-66 of the Negotiable Instruments Law specify what are the warranties on the transfer of a negotiable instrument. As applied to the transfer of negotiable instruments the section of our old Code here under consideration is, therefore, unnecessary, and indeed, if retained, would be likely to be productive of confusion, as it is phrased in different language. As applied to non-negotiable instruments, this section of our Code does not express the general law. See 5 C. J. 156, 8 C. J. 578, and authorities cited. Also see, on this point *Crocker-Woolworth Nat'l Bank v. Nevada Bank* (1903), 139 Cal. 564, 73 Pac. 456. It should be repealed in the interest of uniformity.

<sup>26</sup> §§ 65-66 of the Negotiable Instruments Law, as recommended by the Commissioners, and as cited by text-writers and commentators on that statute. In the different states, the sections have been re-numbered to fit into the enumeration of Code sections.

<sup>27</sup> For example, §§ 5991-93, and § 6002, recently added to the Code in North Dakota, to prevent waivers of causes of action for breach of warranty being made before they have accrued.

farther in this respect than does our Code which was drawn up more than fifty years ago. For further discussion of the intrinsic merits of this particular development, as for discussion of the intrinsic merits of other provisions of the Uniform Sales Act, reference must be made to the treatises.<sup>28</sup>

*Auctions.*—Section 21 of the Uniform Sales Act, while strictly in accord with the common law in the matter, changes our Code<sup>29</sup> which provides that when a sale is made by auction upon written or printed conditions, such conditions cannot be modified by any oral declaration of the auctioneer, except so far as they are for his own interest. No such provision is contained in the Uniform Sales Act. Such provision, too, though cited by the Field Code commissioners as based on decided cases, is apparently opposed to the common law in this country.<sup>30</sup> In this variation from the Uniform Sales Act our old Code provision has never become the basis for any case law. Our law would therefore lose nothing of importance, but would gain in certainty by the repeal of this section of the Code and the adoption of the provisions of the Uniform Sales Act in its stead.

*Statute of Frauds.*—Section 4 of the Uniform Sales Act slightly changes the Code.<sup>31</sup> The Code says that the auctioneer's entry is as binding on the parties as if it were made by themselves. This, also, is the common law, embodied in section 4 of the Uniform Sales Act, except in cases where the auctioneer is himself interested as a seller.<sup>32</sup> This qualification would probably be read into the present Code also.<sup>33</sup> No local case has been decided under this part of the sections. This change in the Code, if indeed it amounts to any change at all, is therefore not a

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<sup>28</sup> See n. 55.

<sup>29</sup> Cal. Civ. Code, § 1795; Revised Codes of Montana, § 5125; Compiled Laws of North Dakota, § 5998; Compiled Laws of South Dakota, vol. 2, § 1344.

<sup>30</sup> See *Kendall v. Bayer* (1909), 144 Iowa 303, 122 N. W. 941, 24 L. R. A. (N. S.) 488.

<sup>31</sup> Cal. Civ. Code, § 1624 (subd. 4) and 1798; Revised Codes of Montana, § 5017 (subd. 4) and 5128; Compiled Laws of North Dakota, § 5888 (subd. 4) and 6001; Compiled Laws of South Dakota, vol. 2, § 1238 (subd. 4) and 1347.

<sup>32</sup> See *Bent v. Cobb* (1858), 9 Gray 397, 69 Am. Dec. 295; *Tull v. David* (1870), 45 Mo. 444, 100 Am. Dec. 385.

<sup>33</sup> See, for example, *Craig v. Godfroy* (1851), 1 Cal. 415, 54 Am. Dec. 299, under the identical section in California, that the auctioneer is agent of the parties for this purpose only at the time of sale, not afterwards, which is a common-law proposition.

worthy objection to the adoption of the Uniform Sales Act. Section 4 of the Uniform Sales Act also changes the expression in our Code that "no sale is valid unless," etc. to "shall not be enforceable by action, unless," etc. The distinction between the two expressions is merely formal. Under either form it has been held that such sales, without the proper memoranda to satisfy the Statute of Frauds, may be shown for other purposes so long as it is not attempted to enforce them affirmatively by action.<sup>34</sup>

Section 4 of the Uniform Sales Act also contains the merely formal change of using the term "of the value of" instead "of the price of" as in our Code. This change in the wording does not produce any substantial change, the word "price" having universally been liberally construed in the American cases to cover barter as well as sales transactions.<sup>35</sup> Section 4 of the

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<sup>34</sup> It should be noted that there are in the various Statutes of Frauds in the different states no less than five forms of expression used in this connection. The expression in the original English Statute of Frauds was "shall not be allowed to be good." This is substantially copied in some states. In some states, including the Code States, the expression is "shall be invalid unless." In one state, it is "no evidence is competent unless it be in writing." In some states the expression is "shall be void." In the present English law, as in the Uniform Sales Act, the expression is "shall not be enforceable by action." It is generally assumed that all these expressions are identical in legal effect, except in the case of "shall be void." For illustration, see, for example, *Cleveland v. Evans* (1894), 5 S. D. 53, 58 N. W. 8, treating the case throughout as if the language were "unenforceable" and even reciting in terms that the two expressions are equivalent. Many authorities on the question are cited in *Williston on Sales*, § 71. The same position was reached on a review of the reasons and authorities in *In re Balfour and Garrette* (1910), 14 Cal. App. 261, 111 Pac. 615. In many cases where the difference in legal effect is not material the language of the courts has often at random been either "void," "invalid," or "unenforceable."

In this connection mention must be made of *Jones v. Pettigrew* (1910), 25 S. D. 432, 127 N. W. 538, which, dealing with the present Code provision declares its effect to be to make the contract "void unless," instead of merely "unenforceable unless." That the case is ill-considered and ought not to be followed appears from the reason for the conclusion announced. The court relies upon the precedents from Minnesota and Wisconsin, where, however, the expression in the statute, was "shall be void unless," being thus clearly distinguishable. As a further criticism of this South Dakota case it should be noted that in South Dakota it has been held, (see *Townsend v. Kennedy*, [1894] 6 S. D. 47, 60 N. W. 164) that the memorandum may be made subsequent to the actual contract, a view consistent only with the statute's making the contract "unenforceable unless," while in Wisconsin for example (see *Rowell v. Barber*, [1910] 142 Wis. 304, 125 N. W. 937), it has been consistently held, under a statute saying "void unless" that a later memorandum does not make the contract valid.

<sup>35</sup> Our present Code (Cal. Civ. Code, § 1805; Revised Codes of Montana, § 5130; Compiled Laws of North Dakota, § 6004; Compiled Laws of South Dakota, vol. 2, § 1349) gives the same effect, in providing that this

Uniform Sales Act makes a more substantial change in our Code, in changing the amount fixed by the statute to \$500.<sup>36</sup> This change is based on the considerations that \$500 more nearly represents at the present time the value than £10 represented in the original English Statute of Frauds and that it may be questioned whether in small transactions, where the custom of reasonable men does not prescribe a writing, the Statute of Frauds does not cause more fraud than it avoids.<sup>37</sup> The American statutes in the various states have usually, but not always, fixed the amount at \$50, while one, in Florida, fixes no limit at all. With the steadily rising prices, this amount makes the statute applicable to smaller and smaller transactions. In some of the states which have adopted the Uniform Sales Act, the amount prescribed by the Act has been changed, though the old figure of \$50 has not always been retained.<sup>38</sup>

*Enforcement of seller's lien.*—Section 60 of the Sales Act changes our Code provisions<sup>39</sup> on the enforcement of the seller's lien. Our Code provides that the unpaid seller, to enforce his lien, may sell as in the case of pledge. The sections on pledge<sup>40</sup> provide that in case of sale of pledged property, the pledgee must first demand performance of the pledgor "if he can be found", and must give actual notice of the time and place of sale at such a reasonable time before the sale as will enable the

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provision of the Statute of Frauds applies to barter if the value of the article bartered exceeds a certain amount. Some situations may be imagined where it will make some difference whether the word "price," or the word "value" is used in the statute, as for example, whether "value" is the value put on the article by the parties or by a reasonable person. Since we have already whatever difficulties the inquiry can bring under the sections relating to barter just referred to, the difference being practically important only in the case of barter, its presence can be no objection to the adoption of the Uniform Sales Act.

<sup>36</sup> The previous figure, in California and Montana was \$200.00, in North Dakota and South Dakota \$50.00.

<sup>37</sup> See Williston on Sales, § 70.

<sup>38</sup> Massachusetts, Arizona, Illinois, New Jersey, North Dakota, Pennsylvania, and Rhode Island adopted the limit of 500.00 set in the Uniform Sales Act as recommended by the Commissioners. In Ohio the limit was fixed at \$2,500.00, in Nevada at \$200.00, in Connecticut and Michigan at \$100.00. In New York, Minnesota, and Wisconsin the original limit of \$50.00 was retained.

<sup>39</sup> Cal. Civ. Code, §§ 1749, 3049; Revised Codes of Montana, §§ 5096, 5803; Compiled Laws of North Dakota, §§ 5966, 6864; Compiled Laws of South Dakota, vol. 2, §§ 1314, 2151.

<sup>40</sup> Cal. Civ. Code, §§ 3001-05; Revised Codes of Montana, §§ 5789-5793; Compiled Laws of North Dakota, §§ 6785-6789; Compiled Laws of South Dakota, vol. 2, §§ 2119-2123.

pledgor to attend the sale, and the sale, when made, must be made by public auction. These provisions applicable to pledge would still remain in the Code after the adoption of the Uniform Sales Act, but would no longer be applicable to the case of an unpaid seller enforcing his lien. The provision of the Uniform Sales Act on the subject permits the unpaid seller, after the buyer's default has lasted an unreasonable time, to sell again without formalities, and without notice to the defaulting buyer, provided that he exercises reasonable care and judgment. Notice to the defaulting buyer, will, however, be material on the question of reasonableness. The purpose of the provision adopted in the Uniform Sales Act is to enable the unpaid seller in possession of goods to realize upon them after the buyer's default has lasted an unreasonable time, without the necessity of intricate or uncertain formalities. That this is the better rule as a practical matter can hardly be open to question.

*Seller's right to recover the price.*—The ordinary rule at common law is that the seller, under a contract of sale which is broken by the buyer, can recover the price in full only if title has passed to the buyer. If title has not yet passed when the contract is broken, the seller still owns the property and is entitled only to damages for breach of contract.<sup>41</sup> There is, however, a considerable body of law allowing the seller, under certain circumstances, to treat the goods as the buyer's and recover the whole price,<sup>42</sup> and some of the authorities even go so far as to let the buyer recover the whole price as a matter of course, regardless of special circumstances and regardless of the question whether title had passed before the contract was broken.<sup>43</sup>

Under the Uniform Sales Act, section 63 (subdivision 3), the rule is settled that the seller may recover the full price, even though title has not passed at the time of the breach, only in the cases where the goods cannot be readily re-sold at a reasonable price. This provides for the only cases where the ordinary common law rule imposes considerable hardship upon the seller

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<sup>41</sup> See Mechem on Sales, § 1690 and numerous authorities cited.

<sup>42</sup> See discussion and authorities cited in Williston on Sales, § 562 et seq.

<sup>43</sup> See, for example, *Dustan v. McAndrew* (1871), 44 N. Y. 72, 78; *Ackerman v. Rubens* (1901), 167 N. Y. 405, 60 N. E. 750, 53 L. R. A. 867, 82 Am. St. Rep. 728; *Neal et al. v. Shewalter et al.* (1892), 5 Ind. App. 147, 154, 31 N. E. 848; *Pate v. Ralston* (1913), 158 Iowa 411, 139 N. W. 906.

and yet prevents the title from being foisted upon the buyer without his consent in ordinary cases. It is roughly analogous to the generally prevailing rule in equity permitting specific performance of a contract for sale of a unique chattel on the ground that damages for the breach are inadequate.<sup>44</sup> This section of the Uniform Sales Act would, to the extent stated, modify our Code,<sup>45</sup> which limits the seller's recovery of the full price to cases where the title has passed. It would, however, prevent any such rule as that the seller should be allowed to recover the full price in all cases from becoming established in our law, as has occasionally been contended even under our Code,<sup>46</sup> and would definitely put the question at rest in the Code States.<sup>47</sup>

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<sup>44</sup> See Williston on Sales, § 564 et seq.

<sup>45</sup> Cal. Civ. Code, § 3311; Revised Codes of Montana, § 6059; Compiled Laws of North Dakota, § 7156; Compiled Laws of South Dakota, vol. 2, § 2303.

<sup>46</sup> See, for example, *Hart-Parr Co. v. Finley* (1915), 31 N. D. 130, 153 N. W. 137. Also see below n. 47.

<sup>47</sup> By the adoption of the Uniform Sales Act, another section of our Code would also be incidentally repealed, namely, the section dealing with transfer of title by executory agreement. See Cal. Civ. Code, § 1141; Revised Codes of Montana, § 4633; Compiled Laws of North Dakota, § 5536; Compiled Laws of South Dakota, vol. 2, § 951. It is likely that this provision was not originally intended to permit the seller to force the title upon the buyer, the cases cited in Commissioner's note to section 498 of the original Field code, seemingly holding that title, if passed at all, passed because of the buyer's assent to the appropriation of the goods to the contract. In California and South Dakota, however, the language of the courts goes far to indicate that under this section the seller from whom the buyer has contracted to buy, can force title upon the buyer, and recover the whole contract price. See *Hallidie v. Sutter St. R. R. Co.* (1883), 63 Cal. 575; *Crocker v. Field's B. & C. Co.* (1892), 93 Cal. 532, 29 Pac. 225; *Cuthill v. Peabody* (1912), 19 Cal. App. 304, 125 Pac. 926; *Dowagiac Mfg. Co. v. Higinbotham* (1902), 15 S. D. 547, 91 N. W. 330; *Lumley v. Miller* (1909), 23 S. D. 16, 119 N. W. 1014.

If argument is necessary to justify the repeal of this provision with these cases in its wake, and the adoption of the Uniform Sales Act in its stead, that argument can be supplied readily on the merits. Leaving out of consideration the question whether these cases have interpreted the section aright, a question doubtful on the original authorities, and decided otherwise in *Hart-Parr Co. v. Finley* (1915), 31 N. D. 130, 153 N. W. 137, there remains the consideration that as interpreted in California and South Dakota this section practically allows to the seller the power to enforce in his own behalf specific performance of a contract to sell an ordinary chattel. This result is conspicuously at variance with the equitable principles underlying the doctrine of specific performance. The objection on the merits to such a rule may be stated in less technical language to lie in the fact that it practically makes every order a completed sale, at the seller's option, and thus makes the buyer liable to pay the whole contract price at all events. While this result is eminently satisfactory to the seller (who is often a machine company whose solicitor has induced the buyer to sign a contract), it is unnecessarily harsh on the buyer who changes his

*Sale by one having a voidable title.*—Under our Code,<sup>48</sup> a minor may sell and transfer title to property of which he is the owner, but he may, within certain limitations, avoid such sale and get the property back. The minor may thus get the property back, even though his transferee has sold it to a purchaser for value without notice, such purchaser getting only the same defeasible title that his seller had. Under our Code a similar situation exists in regard to idiots.<sup>49</sup> By section 24 of the Uniform Sales Act this rule is changed to protect the purchaser for value without notice if he acquired the title from the minor's transferee before the minor or idiot had avoided the sale. This change in the law is justified by Professor Williston in these words: "It is desirable that at some time the title to goods bought from an infant or lunatic should be perfected, and the advantage to trade and the stability of titles justifies the diminution in the privilege of infants and lunatics."<sup>50</sup>

*Sale at a valuation.*—This subject is not provided for directly in our Code, but would fall under the section providing that, if a contract provides an exclusive method by which its consideration is to be ascertained which appears possible on its face but in fact is or becomes impossible, then such provision only is void.<sup>51</sup> The result then is that a sale on terms to be fixed by a third person may become a sale for a price to be determined on principles of *quantum meruit*, which is very different from what the parties themselves agreed. The Uniform Sales Act, section 10, provides that in such cases the sale shall be avoided except as to the goods which have already been delivered to and appropriated by the buyer, for which he must pay a reasonable price. The

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mind between the time of the order and the time for delivery. Where the seller can readily re-sell on the market and hold the defaulting buyer liable only for the difference in price, no consideration of justice requires that he should be allowed to force the goods upon an unwilling buyer and subject him to the increased hardship of having to pay the whole contract price.

<sup>48</sup> Cal. Civ. Code, § 35; Revised Codes of Montana, § 3592; Compiled Laws of North Dakota, § 4340; Compiled Laws of South Dakota, vol. 2, § 17.

<sup>49</sup> Cal. Civ. Code, § 39; Revised Codes of Montana, § 3596; Compiled Laws of North Dakota, § 4344; Compiled Laws of South Dakota, vol 2, § 21.

<sup>50</sup> Williston on Sales, § 348.

<sup>51</sup> Cal. Civ. Code, § 1613; Revised Codes of Montana, § 5009; Compiled Laws of North Dakota, § 5880; Compiled Laws of South Dakota, vol. 2, § 1232.

position taken in the Uniform Sales Act is probably more nearly in accord with common law principles.<sup>52</sup>

#### CHANGES IN CASE LAW RESULTING FROM THE ADOPTION OF THE UNIFORM SALES ACT.

The changes in our present case law which would result from the adoption of the Uniform Sales Act are principally the changes already dealt with in connection with changes in the old Code, the provisions of which have, especially in California, become the basis for case law. Some of the most conspicuous instances of this sort have already been referred to in the notes to the discussion of those changes in the Code.<sup>53</sup>

Apart from the cases depending on the old Code provisions, it is believed that the already announced case law is but slightly affected by the Uniform Sales Act. As that Act is an up-to-date and careful codification of the prevailing common law, and as our cases, too, have been worked out on common law authorities where no code section was applicable to the case in hand, it is natural that the cases thus worked out in our courts should in the main agree with the provisions in the Uniform Sales Act which are additions and not affirmative changes in our Code. That such has actually been the case may be confirmed by comparison of such provisions of the Act with the local cases which have already been mentioned.<sup>54</sup> It would be rash, however, to say that, in litigation for over a generation, there may not have been even isolated dicta running in other directions.

*Some possibly doubtful cases.*—No Code provisions deal definitely with the question of potential possession as such. Several provisions, however, seem to be inconsistent with that doctrine as expressed in common law cases.<sup>55</sup> Some other Code pro-

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<sup>52</sup> For extended discussion of the merits involved in this proposition, see Story on Sales, § 220; 1 Parsons Contracts, 5th Ed. p. 525; 4 Kent's Commentaries, pp. 468, 477; 1 Mecham on Sales, § 213; Williston on Sales, §§ 174-177.

<sup>53</sup> Supra. notes 15-32.

<sup>54</sup> Supra. notes 49, 58, 63, 66, 73, 77, 79, 81, 83, 84, 86, 88, 90.

<sup>55</sup> Cal. Civ. Code, §§ 1140, 1722, 1730; Revised Codes of Montana, §§ 4632, 5080, 5085; Compiled Laws of North Dakota, §§ 5535, 5951, 5956; Compiled Laws of South Dakota, vol. 2, §§ 950, 1300, 1305. Speaking broadly, the doctrine of potential possession permits a seller to transfer now the title to future goods, provided he has them potentially, for example, the land on which the future crop is to be grown.

visions,<sup>56</sup> which have occasionally been relied upon to support it, are concerned with giving after-acquired property as security and therefore do not necessarily involve the doctrine of potential possession, but the equitable doctrine of mortgaging after-acquired property.<sup>57</sup> So far as actual case law in the Code states is concerned, while the question is not free from difficulty, the doctrine of potential possession probably has not become established.<sup>58</sup> If that is the conclusion, no change is affected on this point by the Uniform Sales Act. If it be contended that local cases have countenanced the doctrine, the answer is that the case law is so uncertain in that respect that it would be immensely improved by the Uniform Sales Act in definitely rejecting that doctrine and thereby reducing the law to certainty.<sup>59</sup>

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<sup>56</sup> Cal. Civ. Code, § 2883; Revised Codes of Montana, § 5712; Compiled Laws of North Dakota, § 6706; Compiled Laws of South Dakota, vol. 2, § 2024.

<sup>57</sup> On the question of mortgaging future goods, see Jones on *Chattel Mortgages*. Also see Williston on *Sales*, § 138 et seq. As the cases raising the question frequently involve future crops mortgaged or transferred to secure indebtedness, the equitable doctrine of *Holroyd v. Marshall* (1861), 10 H. L. C. 191, for mortgaging future goods, will often justify the result reached even in cases the language of which gives countenance to the doctrine of potential possession. See for example, *Arques v. Wasson* (1877), 51 Cal. 620.

<sup>58</sup> See for example, *Arques v. Wasson* (1877), *supra*, n. 57; *Blackwood v. Cutting Packing Co.*, (1888), 76 Cal. 212, 18 Pac. 248, *Cutting Packing Co. v. Packers' Exchange* (1890), 86 Cal. 574, 25 Pac. 52, which in their language touch upon potential possession, but the results in which are sustainable without necessarily invoking that doctrine.

Similar remark may be made of the cropper's contract cases. See, for example, *Wentworth v. Miller* (1878), 53 Cal. 9; *Crocker v. Cunningham* (1898), 122 Cal. 547, 55 Pac. 404; *Angell v. Egger* (1897), 6 N. D. 391, 71 N. W. 547; *Dahlund v. Lorentzen et al.* (1914), 30 N. D. 275, 152 N. W. 684. The conclusion in these cases is that the owner of the land, not the renter, is the owner of the crops until division. If the renter is regarded as a technical tenant with an estate in the land, which would make him the owner of the crops also, the result of the cases can be sustained only on the ground that the tenant has, by the original agreement, sold the crops back to the owner of the land before they came into existence, thus involving the doctrine of potential possession. The result of the cases is equally sustainable, however, by regarding the renter as a mere workman on the land, his wages by the agreement being a share of the crop he produces. This view, which does not involve the doctrine of potential possession, is probably the prevailing view. See, however, *Minneapolis Iron Stove Co. v. Branum* (1917), 162 N. W. 543.

<sup>59</sup> Even though it were granted that, on the basis of divided common law authority and these expressions in our local cases, the doctrine of potential possession had been established beyond question in the Code States, the difficult question of its shadowy limits would still involve so much uncertainty that our law would be rendered much more certain by having it abrogated entirely. See Williston on *Sales*, §§ 135-6 and notes of authorities cited.

Section 25 of the Uniform Sales Act provides that a sale by a seller in possession of goods already sold, if delivery is given, will protect the second purchaser who receives the goods paying value in good faith without notice. As applied to North Dakota, this definitely settles, rather than changes, the local law. The code in North Dakota says that retention of possession by the seller is only presumptively fraudulent,<sup>60</sup> but there are neither Code provisions nor local cases on the question whether delivery, apart from the question of fraud, is necessary to convey title good against subsequent purchasers from the original seller.<sup>61</sup> As applied to the other Code states, it is hard to see how any important change on this point can be produced by the Uniform Sales Act, since the old Code provisions,<sup>62</sup> applied in many cases in these states,<sup>63</sup> made such sales constructively fraudulent.

*Definition of value.*—The definition of value in section 76 of the Uniform Sales Act makes an antecedent claim "value" for a transfer of goods or documents of title, either in satisfaction thereof, or as security therefor. This definition, though not in accord with the weight of American authority, apart from the Uniform Sales Act,<sup>64</sup> is more nearly correct on principle<sup>65</sup> and

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<sup>60</sup> Compiled Laws of North Dakota, § 7221.

<sup>61</sup> See Flanigan v. Pomeroy (1902), 85 Minn. 264, 88 N. W. 761 and Williston on Sales, § 350. As the cases are usually also concerned with the question of fraudulent retention of possession, there are not so many clear-cut cases on this proposition alone.

<sup>62</sup> Cal. Civ. Code, § 3440. Revised Codes of Montana, § 6128; Compiled Laws of South Dakota, vol. 2, § 2369.

<sup>63</sup> See, for example, George v. Pierce et. al. (1898), 123 Cal. 172, 55 Pac. 775, and many California authorities cited; Morris v. McLaughlin (1901), 25 Mont. 151, 64 Pac. 219; Ettien v. Drum (1905), 32 Mont. 311, 80 Pac. 369; Howard v. Dwight (1896), 8 S. D. 398, 66 N. W. 935; Pierson v. Hickey (1902), 16 S. D. 46, 91 N. W. 339.

<sup>64</sup> For a concise and able discussion of this question under the common law authorities throughout the country, see Williston on Sales, § 620 and notes, citing authorities.

It is held by the weight of authority in this country that the existence or cancellation of a pre-existing debt is not good consideration for a transfer of title to goods, and that a purchaser under such circumstances not being a purchaser for value, is not protected, even though acting in good faith, against defects in his seller's title. It is submitted that this proposition taken by the weight of authority is erroneous and ought not to be followed, for the cancellation, at least of the pre-existing debt, by extinguishing it, subjects the purchaser of the goods to a detriment he was not bound to bear. Furthermore, any revival of the old debt by operation of law if the purchaser loses the goods he received in exchange for it is no adequate relief, since the original debtor may be and frequently is now insolvent.

In the case of the transfer of bills of lading or warehouse receipts to order, there is a greater tendency among the authorities to hold a pre-

accords with the construction of value adopted in the Negotiable Instruments Law. Whether or not it changes our Code on the definition of valuable consideration<sup>66</sup> can be decided only after it is determined what those sections mean, a task which neither our lawyers nor our courts have as yet been able to perform.<sup>67</sup>

#### SUMMARY OF CONCLUSIONS.

The case for enacting the Uniform Sales Act in the Code States may be shortly recapitulated. Our law is suffering from lack of uniformity with other states and it is very uncertain on many points. This lack of uniformity and lack of certainty may be in large measure remedied by the adoption of the Uniform Sales Act. The list of particular benefits from such a step is long, the list of changes in existing law is short, and the changes themselves are often of a minor nature. At the price of making a few minor changes in our law, we may get the benefit, resulting from uniformity, of more satisfactory dealing with other states, and especially we may get the benefit of more definite rules of law for the trial of our local cases, by which controversies can be settled when they arise, or even be prevented from arising. By profiting from the lesson of the experience of others in litiga-

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existing debt to be good consideration than in the case of transfer of good. See *Cavallaro v. Texas & Pacific Ry. Co.* (1895), 110 Cal. 348, 42 Pac. 918; *Tiedman v. Knox* (1880), 53 Md. 612; *Midland Nat'l Bank v. Missouri Pac. Ry. Co.* (1895), 132 Mo. 492, 33 S. W. 521. The reason for the difference seems to be that since these documents are regarded as more in the nature of commercial paper, semi-negotiable, so to speak, courts are more willing to follow the analogy of negotiable instruments in this particular. That an antecedent debt is held to be value in the case of negotiable instruments, see section 25 of the Negotiable Instruments Law. See Brannan's Negotiable Instruments Law, pp. 32-35, and authorities cited.

<sup>65</sup> The effect will generally be, under this definition of value, that there is the legal detriment which constitutes valuable consideration under ordinary principles of contract, except in the single instance where there is a transfer of the goods as security for a pre-existing debt where there was no obligation to give security.

<sup>66</sup> Cal. Civ. Code, §§ 1605-6; Revised Codes of Montana, §§ 5001-2; Compiled Laws of North Dakota, §§ 5872, 7303; Compiled Laws of South Dakota, vol. 2, §§ 1224-5, 2464.

<sup>67</sup> It is not proposed here to discuss the merits of the questions that have been raised, either under our Code or at common law, as to what is good consideration to support a contract. On that question reference may be made to the treatises on Contracts, and to the cases annotated under our Code provisions. As the definition of value in the Uniform Sales Act follows the principle adopted in the Negotiable Instruments Law, which has now been adopted in all four of the Code states, its enactment may be especially recommended here on the ground of the desirability of uniformity in local commercial law.

tion, which is codified in the Uniform Sales Act, we can attain at a stroke, through legislation, what it has cost others years of expensive litigation to reach. By legislation, we may get these rules at once. By litigation, we can get them only gradually, in a long course of years. By legislation, we can get them complete. By litigation, we can get only isolated fragments at a time. Litigation will always be dilatory, fragmentary, and expensive. Legislation can produce the result at a stroke, promptly, completely, and practically without expense. We should therefore adopt the Uniform Sales Act to give to our law greater uniformity and especially to give to our law a much greater degree of certainty.

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